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Cover Page Footnote

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SPEEDY TRIAL RIGHTS IN APPLICATION

GREGORY P.N. JOSEPH*

INTRODUCTION

Extended pretrial delay in criminal litigation,¹ although frequently claimed by defendants to be a deprivation of a fundamental right, is seldom held to violate speedy trial protection and, even when so held, only rarely determines the outcome of a case. This fact may seem curious in view of the nature, and seeming pervasiveness, of the speedy trial guarantee:² a multiplicity of constitutional, legislative, and judicial sources can support a defendant's claim to a speedy trial,³ and virtually all of these mandate the dismissal with prejudice of pending

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1. The phrase "pretrial delay" is used, in its constitutional sense, to refer to the time period commencing at the instant that "the putative defendant in some way becomes an 'accused,'" *United States v. Marion*, 404 U.S. 307, 313 (1971) (construing U.S. Const. amend. VI), through "either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge," *id.* at 320, and concluding upon his trial on those charges of which he stands "accused." Following *Marion*, most state courts considering the issue have construed the speedy trial rights conferred by their respective state constitutions as attaching at precisely the same instant. *Yarbor v. State*, 546 P.2d 564 (Alaska 1976); *State v. Lee*, 110 Ariz. 357, 519 P.2d 56 (1974); *People v. Sobiek*, 30 Cal. App. 3d 458, 106 Cal. Rptr. 519, *cert. denied*, 414 U.S. 855 (1973); *People ex rel. Coca v. District Court*, 187 Colo. 280, 530 P.2d 958 (1975); *State v. Bryson*, 53 Hawaii 652, 500 P.2d 1171 (1972); *Burruss v. State*, ___ Ind. App. ___, 363 N.E.2d 1036 (Ct. App. 1977); *State v. Fraise*, 350 So. 2d 154 (La. 1977); *State v. Bessey*, 328 A.2d 807 (Me. 1974); *Commonwealth v. Gove*, 366 Mass. 351, 320 N.E.2d 900 (1974); *People v. Williams*, 66 Mich. App. 521, 239 N.W.2d 653 (1976); *State v. Odzark*, 532 S.W.2d 45 (Mo. App. 1976); *People v. White*, 32 N.Y.2d 393, 298 N.E.2d 659, 345 N.Y.S.2d 513 (1973); *State v. Cross*, 48 Ohio App. 2d 357, 357 N.E.2d 1103 (1975); *State v. Edens*, 565 P.2d 51 (Okla. Crim. App. 1977); *State v. Serrell*, 265 Or. 216, 507 P.2d 1405 (1973). What constitutes such "accusation" is procedurally determined. Although the Supreme Court has stated that pretrial delay commences upon an indictment or information, or upon arrest, *United States v. Marion*, 404 U.S. at 320; *see Northern v. United States*, 455 F.2d 427 (9th Cir. 1972), at least one court has considered that the period begins upon the mere filing of a criminal complaint, *People v. Hannon*, 19 Cal. 3d 588, 564 P.2d 1203, 138 Cal. Rptr. 885 (1977). The terminus of pretrial delay, trial, may refer not merely to the commencement of a trial, but to conclusion and entry of judgment of acquittal or a valid conviction. *See* notes 204-05 *infra*. Where a second trial is necessary for any reason, conclusion of the first does not, by definition, terminate pretrial delay. *See* notes 137-39 *infra* and accompanying text.

2. In view of the multiplicity of constitutional, statutory, and rule provisions conferring speedy trial protection on accused persons, this Article adopts the phrase "speedy trial guarantee" as a comprehensive, generic reference to all such protection. The phrase "speedy trial right," in contrast, is used to refer to specific constitutional, statutory, or rule provisions. Further, "constitutional" speedy trial rights—those specified in state or federal constitutions—will be distinguished from "extraconstitutional" speedy trial rights—those specified in statutes and rules—for similar purposes of analytical provisions.

3. *See* pt. I(A) *infra*.

criminal charges if it is not provided.⁴ Yet it appears that the very multiplicity of speedy trial rights creates judicial confusion, and the severity of remedy results in judicial reluctance to enforce these rights.⁵ Despite recognition of the right as "one of the most basic . . . preserved by our Constitution,"⁶ the Supreme Court, noting its "amorphous quality,"⁷ has characterized the constitutional right as "slippery,"⁸ stating that "[i]t is . . . impossible to determine with precision when the right has been denied."⁹ Consequently, many courts, in an apparent effort to avoid dealing with the complex balancing test promulgated by the Court to resolve speedy trial claims,¹⁰ have been increasingly willing to find that a defendant has waived his rights to a speedy trial.¹¹ Overall, the result has been a distinctly limited realization of the goal of speedy trials.

Following a brief examination of the sources of the speedy trial guarantee, their interrelationship, and some problems inherent in the nature and enforcement of speedy trial rights, this Article examines the practical application and operative effect accorded speedy trial rights.¹² It is submitted that the functional effect of speedy trial rights can be assessed by gauging the frequency and consistency with which courts are ruling that extended pretrial delay violates those rights and the extent to which defendants are nonetheless precluded from effectively asserting these violations. Such an approach will provide a factual index to decisions that will assist litigators in arguing, and judges in deciding, speedy trial claims. In addition, the Article suggests a number of legislative and judicial approaches, conducive to effectuating the speedy trial guarantee, which might be pursued.¹³

I. SPEEDY TRIAL RIGHTS

A. Sources

The sixth amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial"¹⁴ The Supreme Court has declared this right "fundamental" and therefore incumbent upon the states by the

4. See Appendix *infra*.

5. See pt. I(B) *infra*.

6. *Klopfer v. North Carolina*, 386 U.S. 213, 226 (1967).

7. *Barker v. Wingo*, 407 U.S. 514, 522 (1972).

8. *Id.*

9. *Id.* at 521.

10. The *Barker* balancing test is discussed in detail below. See notes 50-53 *infra* and accompanying text.

11. See pt. I(B) *infra*.

12. See pt. II *infra*.

13. See pt. III *infra*.

14. U.S. Const. amend. VI.

operation of the fourteenth amendment.¹⁵ The constitutions of every state except Nevada, New York and North Carolina contain parallel provisions, most of which are virtual replicas of the sixth amendment's speedy trial language.¹⁶ The interpretation of state constitutional speedy trial provisions has tracked that of the federal constitutional right: almost all state courts have embraced the federal constitutional standard enunciated in *Barker v. Wingo*¹⁷ for the purpose of determining whether the state constitutional right has been violated,¹⁸ although

15. *Klopper v. North Carolina*, 386 U.S. 213, 222-23 (1967).

16. Ala. Const. art. I, § 6; Alaska Const. art. I, § 11; Ariz. Const. art. 2, § 24; Ark. Const. art. 2, § 10; Cal. Const. art. 1, § 15; Colo. Const. art. II, § 16; Conn. Const. art. 1, § 8; Del. Const. art. I, § 7; Fla. Const. art. 1, § 16; Ga. Const. art. I, § 2-111; Hawaii Const. art. I, § 11; Idaho Const. art. 1, § 13; Ill. Const. art. 1, § 8; Ind. Const. art. 1, § 12; Iowa Const. art. 1, § 10; Kan. Bill of Rights § 10; Ky. Const. § 11; La. Const. art. 1, § 16; Me. Const. art. I, § 6; Md. Declaration of Rights art. 21; Mass. Const. pt. 1, art. XI; Mich. Const. art. 1, § 20; Minn. Const. art. 1, § 6; Miss. Const. art. 3, § 26; Mo. Const. art. 1, § 18(a); Mont. Const. art. II, § 24; Neb. Const. art. I, § 11; N.H. Const. pt. 1, art. 14; N.J. Const. art. 1, ¶ 10; N.M. Const. art. II, § 14; N.D. Const. art. I, § 13; Ohio Const. art. I, § 10; Okla. Const. art. 2, § 20; Or. Const. art. I, § 10; Pa. Const. art. 1, § 9; R.I. Const. art. 1, § 10; S.C. Const. art. I, § 14; S.D. Const. art. VI, § 7; Tenn. Const. art. 1, § 9; Tex. Const. art. 1, § 10; Utah Const. art. I, § 12; Vt. Const. ch. I, art. 10; Va. Const. art. I, § 8; Wash. Const. art. 1, § 22 & amend. 10; W. Va. Const. art. 3, § 14; Wis. Const. art. 1, § 7; Wyo. Const. art. 1, § 10; The three states without state constitutional speedy trial provisions, Nevada, New York, and North Carolina, each confer statutory speedy trial rights upon defendants. See Appendix *infra*. One of these states, North Carolina, recognizes an unwritten but fundamental right to a speedy trial which is construed in accordance with federal constitutional standards. *State v. Wright*, 290 N.C. 45, 224 S.E.2d 624 (1976), *cert. denied*, 429 U.S. 1049 (1977).

17. 407 U.S. 514, 530 (1972).

18. See, e.g., *Prince v. State*, 354 So. 2d 1186 (Crim. App. 1977), *cert. denied*, 354 So. 2d 1193 (Ala. 1978); *People v. Spencer*, 182 Colo. 189, 512 P.2d 260 (1973) (en banc); *State v. L'Heureux*, 166 Conn. 312, 348 A.2d 578 (1974); *Harris v. Hopper*, 236 Ga. 389, 224 S.E.2d 1 (1976); *State v. Almeida*, 54 Hawaii 443, 509 P.2d 549 (1973); *People v. Uplinger*, 45 Ill. App. 3d 558, 359 N.E.2d 1062 (1976), *aff'd*, 69 Ill. 2d 181, 370 N.E.2d 1054 (1977); *Springer v. State*, — Ind. App. —, 372 N.E.2d 466 (Ct. App. 1978); *State v. Steadham*, 231 N.W.2d 29 (Iowa 1975); *State v. Smith*, 215 Kan. 34, 523 P.2d 691 (1974); *Johnson v. Commonwealth*, 514 S.W.2d 115 (Ky. 1974); *State ex rel. Miller v. Craft*, 337 So. 2d 1191 (La. 1976); *State v. Steeves*, 383 A.2d 1379 (Me. 1978); *Commonwealth v. Gove*, 366 Mass. 351, 320 N.E.2d 900 (1974); *People v. Bennett*, 84 Mich. App. 408, 269 N.W.2d 618 (1978); *State v. Hamilton*, 268 N.W.2d 56 (Minn. 1978); *State v. Carden*, — Mont. —, 566 P.2d 780 (1977); *State v. Szima*, 70 N.J. 196, 358 A.2d 773, *cert. denied*, 429 U.S. 896 (1976); *State v. Harvey*, 85 N.M. 214, 510 P.2d 1085 (Ct. App. 1973); *Atnip v. State*, 564 P.2d 660 (Okla. Crim. App. 1977); *State v. Serrell*, 265 Or. 216, 507 P.2d 1405 (1973); *State v. Waites*, 270 S.C. 104, 240 S.E.2d 651 (1978); *State v. Black Feather*, — S.D. —, 249 N.W.2d 261 (1976); *Grayless v. State*, 567 S.W.2d 216 (Tex. Crim. App. 1978); *State v. Dragon*, 130 Vt. 570, 298 A.2d 856 (1972); *Scarborough v. State*, 76 Wis. 2d 87, 250 N.W.2d 354 (1977). Some state courts have applied the *Barker* standard to recent adjudications of state constitutional claims despite prior authority which had refused to do so. Compare *State v. White*, 116 N.H. 687, 366 A.2d 872 (1976) (applying *Barker*) and *Commonwealth v. Lee*, 460 Pa. 374, 333 A.2d 773 (1975) (applying *Barker*) with *State v. Blake*, 113 N.H. 115, 305 A.2d 300 (1973) (deciding state and federal constitutional claims separately) and *Commonwealth v. Hamilton*, 449 Pa. 297, 302, 297 A.2d 127, 129 (1972) (stating that interpretation of the state constitutional provision "need not be limited to the standards set forth to enforce the Federal

it has frequently been done with little explanation or analysis.¹⁹ Nevertheless, a number of state courts have expressly eschewed this approach as encroaching on their sovereign prerogative, theorizing that the federal right provides only a minimum standard of protection, leaving the states free to impose more stringent standards.²⁰

Only one state court has ruled that its state constitutional provision dictates concrete time limits within which the accused must be tried.²¹ In all but one jurisdiction, however, a third source of speedy trial protection—statutes and rules—prescribes specific time limits within which trial must occur,²² although a number of these provisions are

guarantee"). Note also that the unwritten "fundamental law" speedy trial right in North Carolina, see note 16 *supra*, is also deemed governed by the *Barker* analysis. *State v. Wright*, 290 N.C. 45, 224 S.E.2d 624 (1976), *cert. denied*, 429 U.S. 1049 (1977).

19. In most of the decisions applying the *Barker* standard, see cases cited note 18 *supra*, the courts have not analyzed or explained why *Barker* standards should dictate the resolution of state constitutional speedy trial claims. Frequently these opinions begin simply by reciting both the state and federal constitutional provisions—violation of each having been alleged—and then proceed to adjudicate the defendant's claims by applying only the *Barker* criteria. In view of the substantial identity of the language of the state and federal speedy trial provisions, an argument can be made that, given the uniform purpose of the provisions, uniform interpretation is appropriate to ensure consistent results. Because constitutional provisions are by nature subject to continuous reinterpretation in light of changing historical circumstances, however, it can be argued that this approach assumes by default the correctness of the United States Supreme Court's opinions, in dereliction of the state court responsibility to exercise independent judgment in regard to state constitutional rights. See, e.g., Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 501-02 (1977); Douglas, *State Judicial Activism—The New Role for State Bills of Rights*, 12 Suffolk U.L. Rev. 1123, 1142-47 (1978); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 Va. L. Rev. 873, 934-44 (1976); Mosk, *Contemporary Federalism*, 9 Pac. L.J. 711, 719-21 (1978).

20. *Yarbor v. State*, 546 P.2d 564, 566 n.4 (Alaska 1976); *People v. Hannon*, 19 Cal. 3d 588, 606, 564 P.2d 1203, 1214, 138 Cal. Rptr. 885, 896 (1977); *Smith v. State*, 276 Md. 521, 527, 350 A.2d 628, 632 (1976); cf. *State v. Lindsay*, 96 Idaho 474, 475, 531 P.2d 236, 237 (1975) (*Barker* test is consistent with decisions of the state's own courts, but the state constitutional speedy trial guarantee is not "necessarily identical" to the federal right); *People v. Taranovich*, 37 N.Y.2d 442, 449-50, 335 N.E.2d 303, 309, 373 N.Y.S.2d 79, 86 (1975) (Wachtler, J., dissenting) (*Barker* did not diminish the scope of state statutory protection, which did not require a showing of demand by, or prejudice to, the defendant).

21. *Mayberry v. State*, 48 Ala. App. 276, 264 So. 2d 198 (1971), *cert. denied*, 288 Ala. 746, 264 So. 2d 207 (1972).

22. Forty-four states have bestowed speedy trial rights upon some or all criminal defendants by statute, court rule, or both. These extraconstitutional speedy trial rights are identified in the Appendix, *infra*. Moreover, the District of Columbia, the United States, and every state except Alaska, Mississippi, and Louisiana have entered into the Interstate Agreement on Detainers, Pub. L. No. 91-538, §§ 1-8, 84 Stat. 1397 (1970), 18 U.S.C. app. pp. 1395-98 (1976). See 11 Uniform Laws Ann. 68 (Supp. 1980). This Interstate Agreement contains speedy trial provisions specifying time limits within which a defendant, imprisoned on unrelated charges in one jurisdiction, must be brought to trial on criminal allegations detailed in a detainer lodged against him by authorities from another jurisdiction. The Appendix contains references to this Agreement as well as to the Uniform Mandatory Disposition of Detainers Act. This Act, enacted by statute in Alabama, Arizona, Colorado, Kansas, Minnesota, Missouri, North Dakota, and Utah, see 11 Uniform Laws Ann. 68 (Supp. 1980), and by rule in Arkansas, Ark. R. Crim. P. 29.1(a), provides time

triggered only by a defendant's formal demand of a speedy trial.²³ The courts follow essentially two approaches in interpreting the interrelationship between constitutional speedy trial rights and these time-precise statutes and rules. The first approach, employed by several courts, holds that statutory or rule speedy trial rights "implement" or "codify" state and/or federal constitutional guarantees.²⁴ While the exact meaning of these terms is unclear,²⁵ it is evident that they describe a nexus in which the time-precise period quantifies the constitutional right, thereby preventing unquantified "length of delay" questions from arising.²⁶ A variant of this approach, perhaps designed to express a slightly weaker nexus, deems the statutes and rules "supplemental" to, and "constructions" of, the constitutional rights.²⁷ Here again, the extraconstitutional rights are viewed as intended to

limits analogous to those set forth in the Interstate Agreement but applies only when the pending charges arise in the same jurisdiction in which the defendant is imprisoned. Only Mississippi has neither a local speedy trial statute or rule nor the Interstate Agreement or Uniform Act.

23. Three states confer extraconstitutional speedy trial rights entirely contingent upon the defendant's formal demand of a speedy trial. A demand is also required by the Interstate Agreement on Detainers, art. III(a). See Appendix *infra*.

24. *In re* Fla. Rules of Crim. Proc., 245 So. 2d 33 (Fla. 1971) (per curiam) (statute implements state constitutional right); *Underhill v. State*, 129 Ga. App. 65, 198 S.E.2d 703 (1973) (statute implements federal constitutional right); *People v. Sibley*, 41 Ill. App. 3d 616, 354 N.E.2d 442 (1976) (statute implements both state and federal constitutional rights); *State v. Davis*, 209 Kan. 225, 495 P.2d 965 (1972) (same); *State v. Driever*, 347 So. 2d 1132 (La. 1977) (same); *State v. Erickson*, 241 N.W.2d 854 (N.D. 1976) (rule is a mechanism for enforcing federal constitutional right); *State v. Davis*, 44 Ohio App. 2d 95, 335 N.E.2d 874 (1975) (statute implements and codifies state and federal constitutional rights); *Commonwealth v. Myrick*, 468 Pa. 155, 161, 360 A.2d 598, 600 (1976) (rule is "designed to implement and protect a defendant's constitutional right to a speedy trial"; source of rights not specified).

25. Compare, e.g., *People v. Green*, 42 Ill. App. 3d 978, 985, 356 N.E.2d 947, 953 (1976) (terming speedy trial act "the statutory implementation of this [sixth amendment] right") with *People v. Johnson*, 36 Ill. App. 3d 122, 126, 343 N.E.2d 177, 180 (1976) ("the statutory requirement is not coextensive with constitutional safeguards"). See also *State v. Davis*, 44 Ohio App. 2d 95, 97, 335 N.E.2d 874, 876 (1975) (statutory "time limitations . . . [are not] finally and immutably definitive of the Sixth Amendment generalization of the right to a speedy trial").

26. See *People v. Johnson*, 36 Ill. App. 3d 122, 343 N.E.2d 177 (1976).

27. *Townsend v. Superior Court*, 15 Cal. 3d 774, 781, 543 P.2d 619, 625, 126, Cal. Rptr. 251, 257 (1975) (statutory rights "are 'merely supplementary to and a construction of the [state] Constitution'" (citation omitted)); *Carr v. District Court*, 190 Colo. 125, 127, 543 P.2d 1253, 1254 (1975) (en banc) (identical statutory and rule rights are "supplemental to" the state and federal constitutional rights to a speedy trial, which are construed identically); *State v. Lindsay*, 96 Idaho 474, 475, 531 P.2d 236, 237 (1975) (statute "reflect[s] the meaning of that [state] constitutional guarantee"); *Holt v. State*, 262 Ind. 334, 335, 316 N.E.2d 362, 363 (1974) (rule "is the mechanism adopted . . . to insure the [state and federal] constitutional right to a speedy trial"); *Commonwealth v. Fields*, 371 Mass. 274, 279, 356 N.E.2d 1211, 1215 (1976) ("the statute's purpose was to assist in the implementation of the [state and federal constitutional] right[s] to speedy trial"); *State v. Lacy*, ___ W.Va. ___, ___ 232 S.E.2d 519, 522 (1977) ("the legislative adoption or declaration of what, ordinarily, at least, constitutes a speedy trial within the meaning of [state and federal constitutional provisions]").

"clarify and simplify the parameters of the constitutional right,"²⁸ and a number of courts have found violations of the former to be *prima facie* evidence of violations of the latter.²⁹ Under either variation of this approach, however, courts have been careful to discriminate clearly between constitutional and extraconstitutional speedy trial rights, recognizing them as different in nature and scope.³⁰

The second means of reconciling constitutional and extraconstitutional speedy trial rights is through straightforward demarcation of the two. Under this approach, the time-precise period is viewed as stricter than, and not coterminous with, the constitutionally permissible pre-trial period. Consequently, the elapsing of the prescribed period does not of itself comprise, even *prime facie*, a constitutional violation.³¹ Even so, some courts adhering to this analysis utilize the period prescribed by the statute or rule as a gauge of delay, triggering constitutional inquiry if the trial does not occur within the time limits.³²

Regardless of which theory is chosen, the theoretical reconciliation of constitutional and extraconstitutional rights has few practical repercussions. When a speedy trial statute or rule is involved, a court will pursue the same interpretive analysis regardless of whether the claim of violation, if found, is to be labeled constitutional or extraconstitutional. Moreover, because the mandatory sanction required by statutes or rules is almost invariably dismissal with prejudice of all charges,³³ the finding of an extraconstitutional violation makes moot the issue of a constitutional violation. If, conversely, no statutory or rule-based violation is found, all cases agree that, irrespective of the theory of the relationship between constitutional and extraconstitutional rights, a separate analysis of the possible constitutional deprivation is required.³⁴

The reconciliation of extraconstitutional and constitutional speedy

28. Carr v. District Court, 190 Colo. 125, 127, 543 P.2d 1253, 1254 (1975) (en banc).

29. Sykes v. Superior Court, 9 Cal. 3d 83, 507 P.2d 290, 106 Cal. Rptr. 786 (1973); Smith v. State, 266 Ind. 633, 368 N.E.2d 1154 (1977).

30. Potter v. District Court, 186 Colo. 1, 525 P.2d 429 (1974) (en banc); State v. Lindsay, 96 Idaho 474, 531 P.2d 236 (1975); People v. Johnson, 36 Ill. App. 3d 122, 343 N.E.2d 177 (1976); Cooley v. State, 267 Ind. App. 167, 360 N.E.2d 29 (1977); Commonwealth v. Fields, 371 Mass. 274, 356 N.E.2d 1211 (1976); State v. Lacy, — W.Va. —, 232 S.E.2d 519 (1977).

31. Snyder v. State, 524 P.2d 661 (Alaska 1974); State *ex rel.* Berger v. Superior Court, 111 Ariz. 335, 529 P.2d 686 (1974) (en banc); Gardner v. State, 252 Ark. 828, 481 S.W.2d 342 (1972); State v. Hert, 192 Neb. 751, 224 N.W.2d 188 (1974); Rodriguez v. State, 91 Nev. 782, 542 P.2d 1063 (1975); State v. Chamberlain, 131 Vt. 549, 310 A.2d 30 (1973); Beckett v. State, 73 Wis. 2d 345, 243 N.W.2d 472 (1976).

32. State v. Becker, 24 Md. App. 549, 332 A.2d 272 (1975).

33. See Appendix *infra*.

34. People v. Mayes, 178 Colo. 429, 498 P.2d 1123 (1972); Suggs v. State, 358 So. 2d 55 (Fla. Dist. Ct. App. 1978); Cooley v. State, 267 Ind. App. 167, 360 N.E.2d 29 (1977); State v. Henry, 219 Kan. 310, 548 P.2d 808 (1976) (implied holding); State v. Howard, 325 So. 2d 812 (La. 1976).

trial rights also has little bearing on whether a defendant has waived his rights. The Supreme Court has explicitly condoned the application of "standard waiver doctrine" to any claim of constitutional speedy trial violation if the pretrial delay is "attributable to the defendant."³⁵ Thus, to the extent that such federal constitutional analysis governs the interpretation of statutes or rules that "implement," "codify," or "supplement" state constitutional rights,³⁶ application of the standard waiver doctrine, if the defendant indeed delays the trial, is proper. Nevertheless, many courts seem to prefer to apply *Barker's* more liberal "facts-and-circumstances" test of waiver to these extraconstitutional rights.³⁷ In fact, the *Barker* test is frequently applied even to statutes and rules that have been interpreted as separate from the state constitutional right,³⁸ despite the fact that traditional waiver doctrine may appropriately be applied and the *Barker* standard, as such, is inapposite.³⁹ In any event, even an express waiver of statutory or rule rights, however they may be construed, does not constitutionally excuse the failure to try a defendant within a reasonable time after he has announced his readiness for trial.⁴⁰

As applied, all time-precise speedy trial statutes and rules are in some respects stricter, and in some respects more lax, than constitutional speedy trial rights. Such extraconstitutional rights "go beyond constitutional minimum standards"⁴¹ in the sense that the mere expiration of the prescribed time limits, absent trial and without justification,

35. *Barker v. Wingo*, 407 U.S. 514, 529 (1972). In *Barker*, the Supreme Court rejected the "demand-waiver" approach to speedy trial analysis, under which the defendant waives pretrial delay that occurs prior to his making a demand. *Id.* at 529-30. In the Court's view, the defect of this approach was that it presumed waiver of the right from a defendant's silence or inaction. *Id.* at 525. The Court noted, however, that under the "'intentional relinquishment or abandonment'" standard, which it had previously employed for the waiver of other rights of the accused, *id.* at 525-26 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)), delay for which the defendant is responsible may be given effect as waiver.

36. Because the language of most state constitutional speedy trial provisions so closely tracks that of the sixth amendment, federal constitutional analysis presumably controls the interpretation of extraconstitutional provisions that are closely tied to the state constitutional guarantee. *But see* note 19 *supra*.

37. *See, e.g.*, *Chester v. State*, 298 So. 2d 529 (Dist. Ct. App. 1974), *cert. denied*, 310 So. 2d 304 (Fla. 1975); *State v. Erickson*, 241 N.W.2d 854 (N.D. 1976).

38. *See, e.g.*, *State v. Donnell*, 239 N.W.2d 575 (Iowa 1976); *State v. Alvarez*, 189 Neb. 281, 202 N.W.2d 604 (1972). *But see* *Boyle v. Critelli*, 230 N.W.2d 495 (Iowa 1975) (applying *Barker* test separately and exclusively to constitutional rights). Such interpretation is not constitutionally mandated so long as such nonconstitutional statutes and rules are not construed in a manner that constricts the federal right. Such decisions, like others that apply constitutional authorities to resolve extraconstitutional claims, *see* note 37 *supra*, are symptomatic of the muddled analysis prevailing in this area.

39. *Commonwealth v. Carr*, 3 Mass. App. Ct. 654, 338 N.E.2d 844 (1975).

40. *State v. Jackson*, 336 So. 2d 402 (Dist. Ct. App. 1976) (*per curiam*), *cert. denied*, 345 So. 2d 427 (Fla. 1977); *Commonwealth v. Daggett*, 369 Mass. 790, 343 N.E.2d 409 (1976).

41. *State v. Hamilton*, 268 N.W.2d 56, 61 (Minn. 1978).

violates the defendant's rights, making it unnecessary to inquire into such constitutional factors as prejudice to the defendant or his assertion of the right.⁴² Consequently, after the prescribed time period has elapsed, the extraconstitutional right violation obviates the necessity of determining whether any other speedy trial right, constitutional or extraconstitutional, has been violated.⁴³ Yet these statutes and rules—some of which are quite elaborate, replete with detailed exceptions and exclusions⁴⁴—can, in operation, provide more lax protection than is constitutionally permissible by tolling the prescribed period until an unconstitutionally long delay has transpired. Therefore, the bare fact that a defendant's extraconstitutional rights have not been violated does not compel the conclusion that his constitutional rights have been vindicated.

B. Implementation

Three distinct aspects of the right to a speedy trial—the multiple sources of the right, the severity of the remedy, and possibility of waiver of the right by the accused—have presented difficulty for the courts. The first of these, the multiplicity of speedy trial rights, has engendered in the decisional law an imprecision bordering on confusion. Although the foregoing discussion indicates that at least some courts are keenly aware of the distinction between the various speedy trial rights,⁴⁵ the typical judicial decision, which does not discriminate among the many, identically-labeled speedy trial rights, is inherently ambiguous. Such broadranging discussion is often coupled with reliance on inapposite authorities, which have decided speedy trial claims arising from sources that are entirely distinct from the sources of the claims asserted sub judice. Consequently, imprecise issue identification hinders the coherent implementation of specific speedy trial rights.⁴⁶

42. There is still a need to inquire into constitutional factors, however, where, for example, the statute or rule right is triggered only by the defendant's formal demand of a speedy trial, *see* Appendix *infra*, in various procedural contexts, *see* pt. II(A) *infra*, when trial is scheduled beyond the prescribed period but defendant fails to apprise the court of that fact, *see* note 147 *infra* and accompanying text, and where the sanction for the extraconstitutional violation is less severe than dismissal with prejudice of all charges, *see* Appendix *infra*.

43. *United States v. Ford*, 550 F.2d 732 (2d Cir. 1977), *aff'd sub nom. United States v. Mauro*, 436 U.S. 340 (1978); *People v. Sibley*, 41 Ill. App. 3d 616, 354 N.E.2d 442 (1976). This is emphatically not the case, however, if the statutory or rule sanction is less than dismissal with prejudice of all charges coupled with a bar to future charges arising out of the same facts.

44. This rather arbitrary category would include the provisions in force in Alaska, Arizona, Arkansas, California, Colorado, Florida, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Michigan, Missouri, New York (a readiness-for-trial, not speedy trial, provision), North Carolina, Ohio, Vermont (an administrative order), Virginia, Washington, West Virginia, and the Interstate Agreement and Uniform Act. *See* Appendix *infra*.

45. *See* notes 21-32 *supra* and accompanying text.

46. The imprecision with which courts resolve speedy trial claims is compounded by other factors. As noted above, the Supreme Court has articulated a federal constitutional right so

Given the lack of uniformity and certainty in the case law, it is not surprising that the severity of the sanction for violating a speedy trial right also accounts in part for the infrequency with which such violations are found. A number of courts have frankly expressed reluctance concerning "[o]verzealous application"⁴⁷ of the "'draconian remedy'"⁴⁸ of dismissal with prejudice of all charges⁴⁹ to vindicate what is perceived as an ephemeral right. The consistency with which courts avoid holding that speedy trial rights have been denied—even in cases of lengthy pretrial delay—by excusing the cause of delay undoubtedly indicates that many judges have silently experienced a share of the same reluctance.

One means by which this reluctance is effected, and a third factor contributing to the infrequency with which extended delays are classified as speedy trial violations, is the heavy judicial reliance on waiver analysis to resolve speedy trial claims.⁵⁰ Traditionally, waiver has been defined as "an intentional relinquishment or abandonment of a known right or privilege."⁵¹ It is a commonplace that courts often find waiver where this strict standard is not factually satisfied, and this is demonstrably true in cases deciding claims of speedy trial right denial. Factors such as who may waive, how one waives, which right is waived, the extent of waiver of each right, the standards for "intent" and "knowledge," and many other variables are buried, unspecified

nebulous that it is "impossible to determine with precision when the right has been denied." *Barker v. Wingo*, 407 U.S. 514, 521 (1972). *Barker* has, moreover, imposed a fact-permeated analytical approach that grants a virtually determinative role to judicial sensibilities. Consequently, the speedy trial guarantee does not necessarily confer, in practice, the same protection to different defendants in substantially identical circumstances but before different judges. The parallel but separate public policies that support the speedy trial guarantee highlight the varied judicial perspectives. Historically, the purpose of a speedy criminal trial was to protect the defendant by precluding undue pretrial incarceration, minimizing the anxiety accompanying public accusation, and preventing delay that might hamper defense preparation for trial. *Smith v. Hoey*, 393 U.S. 374, 377-78 (1969); *United States v. Ewell*, 383 U.S. 116, 120 (1966). More recently, the advent of soaring crime rates, overburdened courts, and backlogged dockets has led to judicial recognition of an independent "societal interest" in trying defendants speedily. *Barker v. Wingo*, 407 U.S. 514, 519 (1972), in order to prevent them from committing crimes while awaiting trial and to preclude defense utilization of lengthy delay for leverage in plea negotiations. A judge who is more concerned with promoting the historical, rather than the contemporary, purposes underlying the guarantee will be more prone to find a speedy trial right violation in certain circumstances than will a colleague with reversed priorities. An extended period of pretrial incarceration, for example, may impinge upon the historical purposes of the guarantee, yet is unlikely to arouse the sympathies of a judge whose primary concern is the prevention of criminal behavior by the defendant in the period between accusation and trial.

47. *State v. Alfred*, 337 So. 2d 1049, 1057 (La. 1976).

48. *United States v. Jones*, 524 F.2d 834, 852 (D.C. Cir. 1975).

49. See Appendix *infra*.

50. Waiver analysis is applicable even with respect to constitutional speedy trial adjudication. See notes 35-36 *supra* and accompanying text.

51. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

and unquantified, within the unwieldy and imprecise nature of the strict waiver standard. Consequently, these factors are not addressed in curt judicial declarations of waiver of some, part, or all of a defendant's speedy trial rights. As judicially applied in speedy trial cases, waiver is less a concept than a label; the term lends itself less to analysis than to description of a result. Speedy trial right waiver may be viewed more realistically as a function of circumstance and fortuity, dependent primarily upon an individual judge's discretion, than as the result of uniform application of meaningful general principles.

Following *Barker*, many courts have meshed waiver analysis into the analytically prior determination of whether there transpired any violation of defendants' speedy trial rights, which might have been waived. In *Barker*, the Supreme Court articulated a four-pronged ad hoc balancing test to be applied to resolve claims of federal constitutional speedy trial right denial, comprised of the following criteria: (1) length of pretrial delay, (2) reason(s) for the delay, (3) defendant's assertion of his speedy trial right, and (4) prejudice to defendant resulting from the delay.⁵² A number of decisions have incorporated waiver theory—or, at least, waiver language—in considering the third criterion. Doing so, however, leads not to a conclusion that defendant waived his right to a speedy trial, or waived his right to complain that this right was violated, but rather to the conclusion that no violation even occurred: right forfeiture retroactively precludes right attachment. As noted above, *Barker's* impact extends beyond application to the federal constitutional right to virtually all state constitutional rights and certain statutes and rules as well.⁵³

II. PERMISSIBLE, UNASSERTABLE, WAIVED DELAYS: A SURVEY

A. *Procedural Considerations*

A defendant's claim that any of his speedy trial rights has been denied customarily must be brought before the trial court on a motion to dismiss or quash the indictment or information, as appropriate, pursuant to local procedural rules. Several speedy trial statutes and rules specify that failure to make an appropriate motion prior to trial or entry of a guilty plea constitutes a waiver of the statutory or rule right,⁵⁴ and a number of courts construing nonspecific extraconstitutional rights reach the same conclusion.⁵⁵ Although some courts inter-

52. *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

53. See notes 17-19, 38-39 *supra* and accompanying text.

54. Alaska R. Crim. P. 45(f); Ark. R. Crim. P. 30.2; Colo. R. Crim. P. 48(b)(5) & Colo. Rev. Stat. § 18-1-405(5) (1973); Mo. Ann. Stat. § 545.780(5) (Vernon Supp. 1980); Neb. Rev. Stat. § 29-1209 (1975); N.C. Gen. Stat. § 15A-703 (1978).

55. *In re Yurko*, 10 Cal. 3d 857, 519 P.2d 561, 112 Cal. Rptr. 513 (1974); *State v. Williams*, 85 Wash. 2d 29, 530 P.2d 225 (1975) (en banc). *But see Morse v. Municipal Court*, 13 Cal. 3d 149, 529 P.2d 46, 118 Cal. Rptr. 14 (1974) (in bank).

preting nonspecific statutes and rules countenance a dismissal motion made at the time the case is called for trial,⁵⁶ such dilatoriness by the defense—particularly if pretrial delay is extended—is weighed heavily, sometimes conclusively, against defendants who simultaneously assert constitutional claims.⁵⁷ Failure to move for dismissal before the trial court prior to conviction and appeal will, under general principles of appellate review, preclude assertion of any speedy trial rights, whether constitutional or extraconstitutional,⁵⁸ at least in the absence of substantial prejudice to defendant.⁵⁹

Where a valid plea of guilty is entered in lieu of trial, it is generally held that a defendant's failure to move for dismissal prior to entering the plea bars him from subsequently raising any speedy trial claims.⁶⁰ Moreover, since speedy trial rights are not jurisdictional in nature, they are waived by entry of a valid guilty plea⁶¹ even if the defendant

56. *Morse v. Municipal Court*, 13 Cal. 3d 149, 529 P.2d 46, 118 Cal. Rptr. 14 (1974) (in banc); *State v. Steward*, 168 Mont. 385, 543 P.2d 178 (1975); *People v. Bonterre*, 87 Misc. 2d 243, 384 N.Y.S.2d 351 (Crim. Ct. N.Y. 1976).

57. *United States v. Fasanaro*, 471 F.2d 717 (2d Cir. 1973) (*per curiam*); *United States v. Jones*, 475 F.2d 322 (D.C. Cir. 1973); *State v. Carden*, ___ Mont. ___, 566 P.2d 780 (1977); *People v. Kornegay*, 55 A.D.2d 462, 390 N.Y.S.2d 666 (3d Dep't 1977) (applying *Barker* criteria to both state statutory and federal constitutional right).

58. *People v. O'Donnell*, 184 Colo. 104, 518 P.2d 945 (1974) (en banc) (state and federal constitutional, and state statutory and rule, rights); *People v. Bivens*, 43 Ill. App. 3d 79, 356 N.E.2d 665 (1976) (statutory right); *Commonwealth v. Davis*, 367 Mass. 422, 326 N.E.2d 17 (1975) (statutory right); *People v. Adams*, 38 N.Y.2d 605, 345 N.E.2d 318, 381 N.Y.S.2d 847 (1976) (federal constitutional right); *Commonwealth v. Roundtree*, 469 Pa. 241, 364 A.2d 1359 (1976) (state and federal constitutional rights at issue); *State v. Whittier*, 13 Wash. App. 293, 535 P.2d 847 (1975) (rule right). It should be remarked, however, that this rule of nonreviewability is customarily honored in the breach rather than in the observance: perhaps in order to preclude subsequent post-conviction attacks on the effectiveness of defense counsel for failure to assert the speedy trial claims, virtually all cases proceed to at least a summary dictum on the merits after an obeisance in the direction of the general rule of nonreviewability.

59. *Broadnax v. State*, 54 Ala. App. 546, 310 So. 2d 265 (1975); *State v. Raffaele*, 113 Ariz. 259, 550 P.2d 1060 (1976) (en banc).

60. See, e.g., *People v. Bivens*, 43 Ill. App. 3d 79, 356 N.E.2d 665 (1976).

61. *Hulstine v. State*, 533 S.W.2d 228 (Mo. Ct. App. 1975) (construing statutory right); *Garrett v. State*, 534 S.W.2d 325 (Tenn. Crim. App. 1975) (federal constitutional right); *Foster v. State*, 70 Wis. 2d 12, 233 N.W.2d 411 (1975) (federal constitutional right). The only jurisdiction notably excepted from this generalization is New York. In *People v. Chirieleison*, 3 N.Y.2d 170, 143 N.E.2d 914, 164 N.Y.S.2d 726 (1957), the Court of Appeals reasoned that the statutory speedy trial right was not jurisdictional in nature but that improper denial of a defendant's motion to dismiss because of impermissible delay, coupled with the state's breach of its duty to try defendant quickly, would not justify compelling defendant to stand trial solely to preserve the speedy trial issue. Although the *Chirieleison* opinion remarked that waiver of speedy trial rights by guilty plea would be possible "in other circumstances," subsequent decisions have uniformly cited it for the proposition that a defendant has the right to raise any claim of speedy trial violation following a plea of guilty. See, e.g., *People v. Blakley*, 34 N.Y.2d 311, 314, 313 N.E.2d 763, 764, 357 N.Y.S.2d 459, 461 (1974) (state statutory and federal constitutional rights). It might be observed that the *Chirieleison* court could have resolved the dilemma it faced by ruling that the guilty plea was invalid, as non-"knowing" and "intelligent," because it was

previously has asserted a speedy trial denial.⁶² Waiver by guilty plea, however, is contingent upon the validity of the plea. If the guilty plea is invalid because it is "coerced," as by the prosecution's insistence that the speedy trial violation be waived in return for a reduced charge,⁶³ or because it is "not knowledgeably entered," as when based on the defendant's misunderstanding that he could preserve the speedy trial issue on appeal despite the plea,⁶⁴ no effective waiver results.

In the event that a timely motion for dismissal is made, the nature of the showing that the defendant must make in order to prevail, as well as the responsive burden falling to the prosecution, depends upon the type of speedy trial right at issue. If violation of an extraconstitutional right is alleged, the burdens of persuasion and proof will ordinarily be controlled by local procedural statutes or rules: generalizations are difficult to make other than to note that it is necessarily defendant's burden to establish facts which demonstrate that his extraconstitutional right has been violated. In some jurisdictions this burden is met with proof that the prescribed time period has elapsed without trial, and it is then the prosecution's burden to demonstrate that "good cause" exists to excuse the lack of trial.⁶⁵ Elsewhere, the defendant must affirmatively establish not only the expiration of the prescribed period absent trial, but also that he did not cause the delay of his trial.⁶⁶ Indeed, which party bears the burden of accounting for pretrial delay may shift, within a single jurisdiction, from prosecution to defendant depending on the circumstances.⁶⁷ If breach of an extraconstitutional speedy trial right is established, the prosecution bears the burden of establishing defendant's waiver of that right.⁶⁸

predicated on the incorrect assumption that the defendant had no valid claim of speedy trial violation to assert. See notes 63-64 *infra* and accompanying text.

62. *State v. Bridges*, 20 Ariz. App. 273, 512 P.2d 36 (1973) (state and federal constitutional rights). As already discussed, note 61 *supra*, this is not the rule in New York. See *People v. Rathbun*, 48 A.D.2d 149, 368 N.Y.S.2d 317 (3d Dep't 1975).

63. *People v. White*, 32 N.Y.2d 393, 298 N.E.2d 659, 345 N.Y.S.2d 513 (1973) (statutory and federal constitutional right).

64. *Foster v. State*, 70 Wis. 2d 12, 233 N.W.2d 411 (1975) (statutory right). Whether a plea of *nolo contendere* constitutes a waiver of antecedent claims of speedy trial denial depends upon the statutory status accorded such a plea. Compare *Cooksey v. State*, 524 P.2d 1251 (Alaska 1974) (constitutional right waived by plea of *nolo contendere*) with *Siders v. State*, 342 So. 2d 1013 (Fla. Dist. Ct. App. 1977) (*nolo* plea, unlike guilty plea, permits appellate review of speedy trial claims).

65. *Bellizzi v. Superior Court*, 12 Cal. 3d 33, 524 P.2d 148, 115 Cal. Rptr. 52 (1974), *cert. denied*, 420 U.S. 1003 (1975); *State v. Johnson*, 201 Neb. 322, 268 N.W.2d 85 (1978); *People v. McLaurin*, 38 N.Y.2d 123, 341 N.E.2d 250, 378 N.Y.S.2d 692 (1975).

66. See, e.g., *People v. Beyah*, 67 Ill. 2d 423, 367 N.E.2d 1334 (1977).

67. In Arkansas, for example, if an accused remains incarcerated on the pending charges prior to trial, it is the state's burden, upon a defense motion for dismissal, to show that failure to try the defendant within the prescribed period is justified. If, however, the accused is free on bail, it is his burden to show that he did not occasion the pretrial delay. *Holland v. State*, 252 Ark. 730, 480 S.W.2d 597 (1972).

68. See, e.g., *Parker v. State*, 135 Ga. App. 620, 218 S.E.2d 324 (1975).

If violation of a constitutional speedy trial right is claimed, the defendant has the burden of going forward with a *prima facie* case of right deprivation by showing that a delay of "presumptively prejudicial"⁶⁹ length has transpired.⁷⁰ How long a delay must extend to become "presumptively prejudicial" is not fully settled,⁷¹ and there is substantial disparity in the case law as to the proper method by which to compute this period of delay.⁷² If the court concludes that a presumptively prejudicial delay has been demonstrated by the defendant, the court then inquires into the other factors that go into the *Barker* balance and proceeds through a balancing analysis.⁷³ The issue

69. The delay must be "presumptively prejudicial" within the meaning of the "length of delay" factor of *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

70. *Id.*; see *Morris v. Wyrick*, 516 F.2d 1387 (8th Cir.), *cert. denied*, 423 U.S. 925 (1975); *State v. Almeida*, 54 Hawaii 443, 509 P.2d 549 (1973); *People v. Ward*, 85 Mich. App. 473, 271 N.W.2d 280 (1978).

71. There seems general agreement that any delay of eight months or longer is "presumptively prejudicial." See, e.g., *Smith v. Mabry*, 564 F.2d 249 (8th Cir. 1977) (ten months), *cert. denied*, 435 U.S. 907 (1978); *State v. Ballinger*, 110 Ariz. 422, 520 P.2d 294 (1974) (almost eleven months); *People v. Hughes*, 38 Cal. App. 3d 670, 113 Cal. Rptr. 508 (1974) (eight months); *State v. Brown*, 172 Conn. 531, 375 A.2d 1024 (nine months), *cert. denied*, 434 U.S. 847 (1977); *Commonwealth v. Cooke*, 4 Mass. App. Ct. 775, 341 N.E.2d 907 (1976) (eleven months); *Green v. State*, 75 Wis. 2d 631, 250 N.W.2d 305 (almost twelve months), *cert. denied*, 434 U.S. 841 (1977). Furthermore, there is apparent consensus that delay of less than five months is, in the absence of a statute or rule specifying a shorter period, see text accompanying notes 38, 41 *supra*, insufficiently "prejudicial" to trigger further constitutional inquiry. See, e.g., *United States v. Stoker*, 522 F.2d 576 (10th Cir. 1975) (less than three months); *Boyd v. State*, 133 Ga. App. 395, 211 S.E.2d 22 (1974) (three months); *People v. Ward*, 85 Mich. App. 473, 271 N.W. 2d 280 (1978) (five months). There is judicial disagreement as to the six to seven month range, the majority holding a delay of this length "presumptively prejudicial." See *United States v. Simmons*, 536 F.2d 827 (9th Cir.) (six months), *cert. denied*, 429 U.S. 854 (1976); *State v. Almeida*, 54 Hawaii 443, 509 P.2d 549 (1973) (seven months); *State v. Corarito*, 268 N.W.2d 79 (Minn. 1978) (six months). But see *Davis v. State*, 32 Md. App. 318, 323, 360 A.2d 467, 471 (1976) ("[slightly less than seven months is] not sufficiently inordinate to constitute a 'triggering mechanism'").

72. Some jurisdictions calculate the "length of delay" for constitutional purposes not simply by adding together the number of days between accusation and trial but rather by deducting from this total pretrial period the number of days' delay caused by, or attributable to, either the defense or circumstances otherwise beyond the prosecution's control. Only delay caused by, or attributable to, the prosecution is considered within "length of delay" under this approach. See, e.g., *Prince v. Alabama*, 507 F.2d 693 (5th Cir.) (en banc), *cert. denied*, 423 U.S. 876 (1975); *State v. Steeves*, 383 A.2d 1379 (Me. 1978); *Isaacs v. State*, 31 Md. App. 604, 358 A.2d 273 (1976); *People v. Ward*, 85 Mich. App. 473, 271 N.W.2d 280 (1978). Arguably this method of calculation defeats the purpose underlying use of the "length of delay" factor to provide a first-blush, "presumptively prejudicial," criterion to trigger further constitutional inquiry. This approach calls into play a number of the other constitutional criteria, specifically, "reason for delay" and "defendant's assertion of his right," in a subsidiary capacity and thus effectively permits summary disposition of constitutional claims without a measured balancing of all elements of the *Barker v. Wingo* test. Certainly, this approach was not employed in the *Barker* opinion. In *Barker* "length of delay" was equated with the calendar delay of "well over five years," of which "some delay would have been permissible" but most "was attributable to the Commonwealth's failure or inability to try [defendant]." 407 U.S. at 533-34.

73. *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

of ultimate burden of proof has not been addressed specifically in the decisions, probably because it is unhelpful given the fluidity and subjectivity of the judicial inquiry involved.⁷⁴

B. *Recurring Fact Patterns*

The cases reflect a number of recurring fact patterns which tend consistently to generate pretrial delay and, consequently, to raise two issues: whether such delay violates any of the speedy trial rights conferred on the defendant, and—antecedent or subsequent to that question⁷⁵—whether the defendant is to be precluded from effectively asserting the delay as violative of his speedy trial rights. For purposes of analysis, these recurring fact patterns can be segregated into three broad categories: one, situations in which pretrial delay results from the affirmative action of the defendant or defense counsel; two, situations in which the defendant or defense counsel, while not immediately causing pretrial delay, could act affirmatively to prevent it but do not; and, three, situations in which pretrial delay results from circumstances beyond the control of the defendant and defense counsel. While the classification of any specific fact pattern may be somewhat arbitrary,⁷⁶ it does facilitate empirical examination of the resolutions that different judges reach in similar circumstances.

1. Delay Resulting from Affirmative Action of Defendant or Defense Counsel

Predictably, courts are seldom receptive to allegations that speedy trial rights have been denied as a result of delays engendered by affirmative action either of the defendant or of defense counsel. A wide variety of acts, legal and illegal, are performed by defendants with the intent or the effect of delaying, if not avoiding, trial.⁷⁷ The most

74. The decisions speak broadly of the prosecution's fundamental "burden" to ensure that defendant is brought to trial in accordance with his speedy trial rights, *United States v. Latimer*, 511 F.2d 498 (10th Cir. 1975) (federal constitutional right), but this phraseology is traceable to a nonspecific dictum in *Barker*: "A defendant has no duty to bring himself to trial; the State has that duty" 407 U.S. at 527.

75. See pt. I(B) *supra*.

76. Thus what one judge may classify as delay resulting from affirmative defense action (such as a successful motion for certain discovery) may be viewed by another as delay due to circumstances beyond defendant's control (assuming that such discovery motion is necessitated by prosecutorial dilatoriness or misconduct) or seen by a third as delay attributable to defendant's inaction (because of defendant's failure to tender the motion until the very end of a time-precise statutory or rule period).

77. Some of the more common means of avoiding trial include: defendant's failure to identify himself accurately for police, *State v. Belland*, 24 Ariz. App. 87, 535 P.2d 1318 (1975) (rule right); defendant's failure to provide police with his proper or complete address, *People v. Davis*, 80 Misc. 2d 301, 363 N.Y.S.2d 281 (Sup. Ct. 1975) (federal constitutional right); defendant's waiting until the end of the prescribed period to file a jury waiver (thereby precluding jury selection and

common illegal act by which a defendant causes pretrial delay is flight or other unexcused absence from proceedings involving the charges against him. Most speedy trial statutes and rules explicitly provide that any delay resulting from the absence or unavailability of the accused is not to be considered in computing the prescribed period within which trial must otherwise commence.⁷⁸ Even in the absence of a specific provision to that effect, the cases reflect the conclusion that a defendant's escape or voluntary nonappearance bars him from asserting any extraconstitutional right to complain of resulting delay.⁷⁹ In some jurisdictions, such nonappearance waives the entirety of the time-precise right, which attaches anew only upon the defendant's return or recapture.⁸⁰ Similarly, under statutes or rules which require that a defendant formally demand a speedy trial to trigger commencement of the time-precise period, subsequent escape amounts to waiver of the demand.⁸¹ Constitutionally, such flight or voluntary nonappearance is weighed heavily against a defendant who claims breach of sixth amendment or state constitutional rights by virtue of the resulting delay,⁸² and escape has been expressly held to be a waiver of such rights.⁸³

disrupting court scheduling), *Lewis v. State*, 165 Ind. App. 267, 332 N.E.2d 107 (1975) (rule right); defendant's attempt to procure prosecution witness' absence, *Boyd v. State*, 133 Ga. App. 395, 211 S.E.2d 22 (1974) (federal constitutional right); and defendant's attempted suicide, necessitating medical care, *People v. Manina*, 45 Cal. App. 3d 896, 120 Cal. Rptr. 51 (1975) (statutory and constitutional rights). In each of these situations, the cases deemed the resulting delay excusable and nonviolative of the respective speedy trial rights at issue.

78. Alaska R. Crim. P. 45(d)(4); Ariz. R. Crim. P. 8.4(a); Ark. R. Crim. P. 28.3(e); Cal. Penal Code § 1382(2)-(3) (West Supp. 1979); Colo. R. Crim. P. 48(b)(6)(IV) & Colo. Rev. Stat. § 18-1-405(6) (1973); Fla. R. Crim. P. 3.191(e); La. Code Crim. Proc. Ann. art. 579(1) (1967); Mo. Ann. Stat. § 545.780(3)(2) (Vernon Supp. 1980); Neb. Rev. Stat. § 29-1207(4)(d) (1975); N.Y. Crim. Proc. Law § 30.30(4)(c) (McKinney Supp. 1979); N.C. Gen. Stat. § 15A-701(b)(3) (Supp. 1979); Ohio Rev. Code Ann. § 2945.72(A) (Page 1975); Pa. R. Crim. P. 1100(d)(1); Va. Code § 19.2-243(4) (1975); Wash. R. Crim. P. 3.3(f); W. Va. Code § 62-3-21 (1977); Interstate Agreement on Detainers art. III(f); Uniform Mandatory Disposition of Detainers Act § 4. However, the extraconstitutional right is waived only to the extent that defendant's flight actually causes delay: if his absconding occasions no delay it is not excludable. *Commonwealth v. Lewis*, 237 Pa. Super. 357, 352 A.2d 99 (1975). If, on the other hand, defendant's absence does disrupt the schedule of proceedings, defendant is barred from asserting, as violative of his extraconstitutional rights, not only the period actually elapsing during his absence but also the resulting delay in re-docketing the case on the trial calendar. *People v. Hayes*, 48 Ill. App. 3d 459, 363 N.E.2d 84 (1977); *State v. Lyles*, 225 N.W.2d 124, 126 (Iowa 1975) ("The State's duty to provide a defendant with a speedy trial does not require that it play a game of hide-and-go-seek with him"); *State v. Sherman*, 217 Kan. 326, 536 P.2d 1373 (1975).

79. *State v. Brandt*, 253 N.W.2d 253 (Iowa 1977); *State v. Welch*, 212 Kan. 180, 509 P.2d 1125 (1973); *People v. Patterson*, 38 N.Y.2d 623, 345 N.E.2d 330, 381 N.Y.S.2d 858 (1976).

80. See, e.g., *Holmes v. State*, 136 Ga. App. 572, 222 S.E.2d 121 (1975); *State v. Howard*, 325 So. 2d 812 (La. 1976).

81. *Holmes v. State*, 136 Ga. App. 572, 222 S.E.2d 121 (1975); Interstate Agreement on Detainers art. III(f); Uniform Mandatory Disposition of Detainers Act § 4.

82. *Boyd v. State*, 133 Ga. App. 395, 211 S.E.2d 22 (1974).

83. *United States v. DeTienne*, 468 F.2d 151 (7th Cir. 1972), cert. denied, 410 U.S. 911

Different considerations are presented when the defendant's delay-producing act is lawful, indeed constitutionally protected, such as the exercise of his right to counsel of his choice by substituting counsel after arrest but before trial. In such circumstances new counsel will necessarily require time to prepare for trial. Ordinarily, if the substitution is effected well in advance, trial need not be delayed and no speedy trial issue should arise.⁸⁴ If, however, the defendant substitutes new counsel shortly before trial, necessitating a continuance for trial preparation purposes, and the defendant subsequently complains of the delay, a number of constitutional rights must be considered by the court: not only defendant's speedy trial rights, but also his rights to counsel of his choice, to effective assistance of counsel, and to a fair trial.⁸⁵ Uniformly, resolution of the speedy trial question has been eminently pragmatic, with courts refusing to countenance a defendant's attempt to manipulate speedy trial rights when the court has acceded to change of counsel requests in order to preclude deprivation of counsel and fair trial rights.⁸⁶ Therefore, a defendant is barred from insisting upon discharge for having thus delayed trial beyond any applicable statutory or rule period.⁸⁷ In the same fashion, delay attributable to pretrial counsel substitution is not considered cause, alone or in conjunction with other delays, for finding constitutional speedy trial right violations.⁸⁸

Just as the pretrial delay personally caused by defendant may not normally be asserted as causing or contributing to speedy trial right deprivation, the delay generated by pretrial preparation and defense against the prosecution's charges also does not customarily violate the speedy trial right. Chronologically, the first opportunity given certain defendants to retard progress of the prosecution may arise in extradition proceedings. The same statutory and rule provisions that dictate tolling of the prescribed time periods for the absence or unavailability of the accused also include language covering situations in which the

(1973); *People v. Washington*, 49 A.D.2d 914, 374 N.Y.S.2d 34 (2d Dep't. 1975); *Foster v. State*, 75 Wis. 2d 12, 233 N.W.2d 411 (1975).

84. Consequently, it is improper for the trial court to impose a delay on the assumption that new counsel will require more time to prepare than remains within the applicable statutory or rule period. *Simpson v. State*, 165 Ind. App. 285, 332 N.E.2d 112 (1975).

85. See U.S. Const. amend. VI.

86. "Surely, if the case had gone to trial as scheduled and defendant convicted, he would now be contending that he had been denied a fair trial because his counsel did not have adequate time to prepare his defense." *State v. Dowell*, 16 Wash. App. 583, 588 n.1, 557 P.2d 857, 860 n.1 (1976).

87. *Id.*; *State v. Lewis*, 112 Ariz. 38, 537 P.2d 25 (1975); *People v. Todd*, 34 Ill. App. 3d 844, 340 N.E.2d 669 (1976); *State v. Shockey*, 214 N.W.2d 146 (Iowa 1974); *State v. Lewis*, 220 Kan. 791, 556 P.2d 888 (1976); *People v. Patterson*, 38 N.Y.2d 623, 345 N.E.2d 330, 381 N.Y.S.2d 858 (1976).

88. *People v. Powell*, 40 Cal. App. 3d 107, 115 Cal. Rptr. 109 (1974), *cert. denied*, 420 U.S. 994 (1975); *Scarborough v. State*, 76 Wis. 2d 87, 250 N.W.2d 354 (1977).

defendant's whereabouts are known but he resists being returned.⁸⁹ In addition, certain of these provisions carve out from consideration any delay due to the pendency of extradition proceedings.⁹⁰ Under these, as well as under nonspecific extraconstitutional enactments, a defendant's refusal to waive extradition precludes him from successfully asserting that he was denied a speedy trial to the extent of consequent delay.⁹¹ Similarly, a defendant's affirmative action in attempting to block his extradition is held a waiver of his constitutional speedy trial rights to the same extent.⁹²

Once personal jurisdiction over defendant is securely exercised, two parallel processes usually commence in tandem, one on the record, the other not. The recorded process revolves around procedural and discovery motions and related proceedings, including appeals; the unrecorded process involves negotiations directed toward entry of a plea of guilty. Both of these processes involve delays that have been claimed to be violative of speedy trial rights.

Several variables influence whether, or to what extent, a pretrial motion may result in delay which can be asserted as violative of speedy trial rights, including the nature and scope of the motion and resulting delay; timeliness, and timing, of the motion; and responses to it by the court and the other party. Some statutes and rules explicitly prevent delay occasioned by pretrial motions from serving as the basis for successful claims of speedy trial right denial.⁹³ Most, however, are silent on the subject, and extensive case law has developed. A cardinal principle articulated in the decisions is that the mere filing of a defense motion, as for discovery, does not cause delay per se. Therefore, if the defendant is not to be tried within any applicable prescribed time period, he is not precluded from successfully asserting subsequent claims of speedy trial deprivation unless a court has determined that the motion in fact caused delay and that such delay prevented defendant's timely trial.⁹⁴ Further, even if delay of some duration has

89. See note 78 *supra*.

90. See, e.g., Ohio Rev. Code Ann. § 2945.72(A) (Page 1975).

91. Balla v. State, 97 Idaho 378, 544 P.2d 1148 (1976); People v. Uplinger, 69 Ill. 2d 181, 370 N.E.2d 1054 (1977).

92. State v. McDonald, 111 Ariz. 159, 526 P.2d 698 (1974); Balla v. State, 97 Idaho 378, 544 P.2d 1145 (1976).

93. Speedy Trial Act of 1974, 18 U.S.C. § 3161(h)(1)(E),(G) (1976); Alaska R. Crim. P. 45(d)(1); Ark. R. Crim. P. 28.3(a); Fla. R. Crim. P. 3.191(d)(2)(iv); La. Code Crim. Proc. Ann. art. 580 (1967); Mich. Gen. Ct. R. 789.2(1); Mo. Ann. Stat. § 545.780(3)(1)(c), (e) (Vernon Supp. 1980); Neb. Rev. Stat. § 29-1207(4)(a) (1975); N.C. Gen. Stat. § 15A-701(b)(1)(d) (Supp. 1979); N.Y. Crim. Proc. Law § 30.30(4)(a) (McKinney Supp. 1979).

94. People v. Donalson, 64 Ill. 2d 536, 356 N.E.2d 776 (1976); People v. Terry, 61 Ill. 2d 593, 338 N.E.2d 162 (1975); People v. Ferguson, 46 Ill. App. 3d 815, 361 N.E.2d 339 (1977); Jones v. State, 279 Md. 1, 367 A.2d 1 (1976), *cert. denied*, 431 U.S. 915 (1977). If the prescribed period commences only upon defendant's demand, motions made and decided prior to demand

occurred, the defendant is not barred from asserting his right to trial within the applicable prescribed period if the motion was timely made⁹⁵ but the prosecution is dilatory in responding⁹⁶ or the court in ruling.⁹⁷ When, however, numerous, complex, or other time-consuming defense discovery motions in fact generate delay,⁹⁸ especially if they are filed so close to the time of trial or the expiration date of the prescribed period that they cannot be opposed, heard, and decided within the time remaining,⁹⁹ a defendant forfeits his right to insist on strict adherence to the period's time limits. Conversely, the prosecution may violate defendant's extraconstitutional right to trial within the prescribed period by demanding extensive discovery from defendant when the response time exceeds time remaining before trial and within the period, necessitating a continuance.¹⁰⁰ The same considerations control decision of speedy trial claims arising from other pretrial defense motions (except for continuance motions) that result in delay. These include motions for change of venue,¹⁰¹ psychiatric examination of defendant,¹⁰² suppression of evidence,¹⁰³ substitution

obviously have no effect on the statutory period. Yet the issue has been litigated. *Simpson v. State*, 165 Ind. App. 285, 332 N.E.2d 112 (1975).

95. *State v. Durham*, 13 Wash. App. 675, 537 P.2d 816 (1975). For example, the motion would be timely if made upon arraignment or well before the expiration of the prescribed time period.

96. *People v. Neideffer*, 25 Ill. App. 3d 819, 324 N.E.2d 46 (1975); *People v. Nunnery*, 54 Ill. 2d 372, 297 N.E.2d 129 (1973).

97. *People v. Johnson*, 38 N.Y.2d 271, 342 N.E.2d 525, 379 N.Y.S.2d 735 (1975). Some statutes and rules expressly limit the length of time a court can keep a motion under consideration without having this period of delay inserted in the formula that determines whether defendant was tried within the prescribed time period. Speedy Trial Act of 1974, 18 U.S.C. § 3161(h)(1)(G) (1976) (no more than 30 days excluded for the consideration of any motion); Alaska R. Crim. P. 45(d)(1) (same); Ark. R. Crim. P. 28.3(a) (same); Mo. Ann. Stat. § 545.780(3)(1)(e) (Vernon Supp. 1980) (same).

98. *People v. Thomas*, 25 Ill. App. 3d 88, 322 N.E.2d 597 (1975); *State v. McDonald*, 111 Ariz. 159, 526 P.2d 698 (1974); *People v. Henderson*, 39 Ill. App. 3d 164, 351 N.E.2d 225 (1976); *Griffith v. State*, 163 Ind. App. 11, 321 N.E.2d 576 (1975); *State v. Truax*, 232 N.W.2d 861 (Iowa 1975).

99. *Rosenwasser v. Smith*, 308 So. 2d 600 (Fla. Dist. Ct. App. 1975); *State v. King*, 225 N.W.2d 337 (Iowa 1975).

100. *People v. Shields*, 58 Ill. 2d 202, 317 N.E.2d 529 (1974).

101. Defendant cannot complain of delay resulting from his change of venue motion. *State v. Moles*, 166 Ind. App. 632, 337 N.E.2d 543 (1975); *State v. Lacy*, 46 Ohio App. 2d 215, 348 N.E.2d 381 (1975); *State v. Runge*, 233 N.W.2d 321 (S.D. 1975); Mo. Ann. Stat. § 545-780(3)(1)(d) (Vernon Supp. 1980); Ohio Rev. Code Ann. § 2945.72(F) (Page 1975); *cf.* Speedy Trial Act of 1974, 18 U.S.C. § 3161(h)(1)(F) (1976) (delay resulting from transfer between districts per Federal Rules of Criminal Procedure). *But see* *State v. DeLong*, 16 Wash. App. 452, 557 P.2d 14 (1976) (under state rule, time consumed in consideration of defense change-of-venue motion not excluded).

102. *People v. Donalson*, 64 Ill. 2d 536, 356 N.E.2d 776 (1976) (defense motions, including motion for physical examination of defendant, resulting in delay beyond the 26 days remaining in the statutory pretrial period, constitute defense acquiescence in post-period trial); Com-

of judges,¹⁰⁴ severance,¹⁰⁵ trial transcript¹⁰⁶ or dismissal of charges.¹⁰⁷ In resolving constitutional speedy trial claims in such cases, the decisions reflect judicial refusal to permit the defense to capitalize on delay attributable to a defendant's pretrial motions, provided that the court rules upon them within a reasonable time.¹⁰⁸ In weighing delays necessary for hearing and decision of nonfrivolous and timely filed pretrial motions, other than for a continuance, the courts generally do not permit a defendant to complain of "self-caused delay" so long as no suggestions of bad faith or dilatoriness are present,¹⁰⁹ and a number of courts hold that in these circumstances neither defense nor prosecution motions cause "delay" within the meaning of the *Barker* test.¹¹⁰

Defense motions, or acquiescence in others' motions, for pretrial

monwealth v. Boyd, 367 Mass. 169, 326 N.E.2d 320 (1975) (even in the absence of a formal motion for continuance, a successful defense motion for psychiatric examination of defendant precludes defense assertion of resulting delay as violative of statutory time requirements). Many statutes and rules explicitly provide that delay caused by examinations or hearings concerning defendant's competency shall be excluded in computing pretrial delay for purposes of mandatory, time-precise provisions. Speedy Trial Act of 1974, 18 U.S.C. § 3161(h)(1)(A) (1976); Alaska R. Crim. P. 45(d)(1); Ariz. R. Crim. P. 8.4(a); Ark. R. Crim. P. 28.3(a); Colo. R. Crim. P. 48(b)(6)(1) & Colo. Rev. Stat. § 18-1-405(6)(a) (1973); Fla. R. Crim. P. 3.191(d)(2)(iv); Ill. Ann. Stat. ch. 38 § 103-5(a)-(b), (e) (Smith-Hurd 1970); Kan. Stat. Ann. § 22-3402(3)(b) (Supp. 1978); Mich. Gen. Ct. R. 789.2(1); Mo. Ann. Stat. § 545.780(3)(1)(a) (Vernon Supp. 1980); Neb. Rev. Stat. § 29-1207(4)(a) (1975); N.Y. Crim. Proc. Law § 30.30(4)(a) (McKinney Supp. 1979); N.C. Gen. Stat. § 15A-701(b)(1)(a) (Supp. 1979); Ohio Rev. Code Ann. § 2945.72(B) (Page Supp. 1979); Va. Code § 19.2-243(1) (1975); Wash. R. Crim. P. 3.3(e)(1).

103. *People v. Kemp*, 49 Ill. App. 3d 270, 364 N.E.2d 944 (1977) (where motions to suppress necessitate a hearing and written decision, consequent delay is tolled for purposes of statutory speedy trial time period). Some extraconstitutional rights specify that delay so occasioned is not to be deemed in derogation of defendant's statutory or rule right. Alaska R. Crim. P. 45(d)(1); Neb. Rev. Stat. § 29-1207(4)(a) (1975).

104. *State v. Brown*, 112 Ariz. 401, 542 P.2d 1100 (1975) (delay caused by defense motion to substitute judges is excluded in determining compliance with fixed rule period); *People v. Richmond*, 34 Ill. App. 3d 328, 340 N.E.2d 240 (1975) (statutory speedy trial period commences again upon reassignment to new judge); *People v. Macklin*, 7 Ill. App. 3d 713, 288 N.E.2d 503 (1972) (where defendant's case was not assigned a judge until the last day of the statutory period, defendant immediately exercised his right to move for substitution, and two other judges were available, consequent delay held not unavoidable and thus not attributable to defendant).

105. *People v. Grant*, 68 Ill. 2d 1, 368 N.E.2d 909 (1977) (successful defense motion to sever tolls the time-precise provision of statute).

106. *State v. Butler*, 243 N.W.2d 232 (Iowa 1976) (after mistrial, successful defense motion for trial transcript that results in lengthy delay before retrial precludes defense assertion that such delay violates rule right to trial within shorter fixed time period).

107. *Hodge v. State*, 264 Ind. 708, 344 N.E.2d 293 (1976) (delay during pendency of motion to dismiss is chargeable to defendant and not considered to be in derogation of time-precise rule right); Alaska R. Crim. P. 45(d)(1).

108. *United States v. Jones*, 524 F.2d 834, 850 (D.C. Cir. 1975) ("A defendant should not be able to take advantage of a delay substantially attributable to his own trial motions when the court acts upon them within a reasonable period of time").

109. *Braden v. Capps*, 517 F.2d 221 (5th Cir. 1975).

110. *Scarborough v. State*, 76 Wis. 2d 87, 250 N.W.2d 354 (1977); *Tarney v. State*, 512 P.2d 923 (Alaska 1973).

continuances have stimulated evolution of a separate body of case law that, distinctively, entails numerous issues concerning the role and authority of defense counsel in effecting waiver of defendants' speedy trial rights. Time-precise speedy trial statutes and rules sometimes specify that delay resulting from a continuance requested or consented to by the defense will not be considered in calculating the prescribed period within which defendant is entitled to be tried.¹¹¹ Certain statutes and rules, however, also condition the court's power to order such continuances¹¹² or limit the extent to which resulting delay excuses trial beyond the prescribed period.¹¹³ Beyond such express provisions, the cases hold that a represented defendant's motion, or acquiescence in another party's motion, for a continuance that will conclude only after the prescribed period expires bars defendant from claiming denial of his right to trial within this period.¹¹⁴ If a con-

111. Alaska R. Crim. P. 45(d)(2); Ariz. R. Crim. P. 8.4(d); Ark. R. Crim. P. 28.3(c); Cal. Penal Code § 1382(2)-(3) (West Supp. 1979); Colo. R. Crim. P. 48(b)(3) & Colo. Rev. Stat. § 18-1-405(3) (1973); Ind. R. Crim. P. 4(A); Mich. Gen. Ct. R. 789.2(2); Mo. Ann. Stat. § 545.780(3)(5)(a) (Vernon Supp. 1980); Neb. Rev. Stat. § 29-1207(4)(b) (1975); Ohio Rev. Code Ann. § 2945.72(H) (Page 1975); Or. Rev. Stat. § 135.747 (1977); Pa. R. Crim. P. 1100(d)(2); Utah Code Ann. § 77-51-1 (1978); Va. Code § 19.2-243(4) (1975); Wash. R. Crim. P. 3.3(f)(1); W. Va. Code § 62-3-21 (1977).

112. Thus some statutes and rules require that an unrepresented defendant cannot effectively consent to a pretrial continuance unless the court has advised him of the statutory rule right. Alaska R. Crim. P. 45(d)(2); Cal. Penal Code § 1382(3) (West 1970); Neb. Rev. Stat. § 29-1207(4)(b) (1975); N.Y. Crim. Proc. § 30.30(4)(b) (McKinney Supp. 1979). Others require defendant's on-the-record concurrence in the continuance after the court has explained extraconstitutional ramifications. Mich. Gen. Ct. R. 789.2(2). Under some statutes and rules, a continuance can be granted only if the court determines that there exists "good" or "sufficient" cause for it or that it will serve the "ends of justice," and such finding may be required to be specified on the record. Speedy Trial Act of 1974, 18 U.S.C. § 3161(h)(8)(A) (1976); Alaska R. Crim. P. 45(d)(2); Ariz. R. Crim. P. 8.5(b) (requiring "extraordinary circumstances"); Mo. Ann. Stat. § 545.780(3)(5)(a) (Vernon Supp. 1980); N.M. R. Crim. P. (Dist. Ct.) 37; N.Y. Crim. Proc. Law § 30.30(4)(b) (McKinney Supp. 1979).

113. Certain statutes and rules provide that each continuance is limited to a fixed duration, some limiting the number of permissible continuances as well. Ariz. R. Crim. P. 8.5(b) (counsel may stipulate to no more than one 30-day continuance if defendant is noncustodial; no such stipulation if defendant is in custody); Wis. Stat. § 971.10(3)(a)-(b) (West 1971) (continuances limited to periods of 60 days each); cf. Ill. Ann. Stat. ch. 38, § 103-5(c), (e) (Smith-Hurd 1970) (limit of one 60-day continuance for same purpose); Ind. R. Crim. P. 4(D) (90 day limit on extension of time to give prosecution the opportunity to obtain evidence "which cannot [earlier] be had"); Kan. Stat. Ann. § 22-3402(3)(c) (Supp. 1978) (limit of one 90-day continuance, or two continuances totalling no more than 120 days, for same purpose).

114. Request for continuance: *State v. Luck*, 336 So. 2d 464 (Fla. Dist. Ct. App. 1976); *State v. Sherman*, 217 Kan. 326, 536 P.2d 1373 (1975); *City of Sioux Falls v. Mini-Kota Art Theatres, Inc.*, 247 N.W.2d 676 (S.D. 1976). Acquiescence in (failure to object to) prosecution's motion, or joint stipulation: *State v. Parker*, 116 Ariz. 3, 567 P.2d 319 (1977); *People v. Flowers*, 190 Colo. 453, 548 P.2d 918 (1976); *Snelling v. State*, 163 Ind. App. 546, 325 N.E.2d 227 (1975); *Commonwealth v. Daggett*, 369 Mass. 790, 343 N.E.2d 409 (1976); *State v. Taylor*, 47 Ohio App. 2d 171, 352 N.E.2d 604 (1975); *Commonwealth v. Hickson*, 235 Pa. Super. 496, 344 A.2d 617 (1975). Acquiescence in (failure to object to) co-defendant's continuance motion: *People v.*

tinuance forcing trial beyond the prescribed period is obtained on motion of an unrepresented defendant, the motion may constitute a waiver of defendant's extraconstitutional speedy trial rights,¹¹⁵ at least if the continuance is not requested on the basis of misinformation provided by the prosecution.¹¹⁶ An unrepresented defendant's passivity in the wake of another's motion for continuance, however, is not tantamount to his acquiescence in it and he does not thereby waive his right to insist upon trial within the extraconstitutional period.¹¹⁷ On the other hand, many statutes and rules require that pretrial delay engendered by prosecution-secured continuance is in many circumstances to be excluded in calculating compliance with the applicable time period, irrespective of whether the defendant is or is not represented.¹¹⁸

Where the right to insist upon strict compliance with the extraconstitutional protection is forfeited, in part or in its entirety, it remains incumbent upon the court to select a trial date which ensures protection of defendant's constitutional right.¹¹⁹ Moreover, the request for, or acquiescence in, a continuance by the defense removes the continued period from constitutional consideration under a common construction of *Barker*,¹²⁰ and may preclude the finding of any constitutional violation even if it is constitutionally considered.¹²¹

A represented defendant is ordinarily bound by his counsel's action in requesting or concurring in requests for continuance,¹²² even if the defendant is not first consulted, is not present, is unaware of or

Vaughn, 532 P.2d 782 (Colo. Ct. App. 1975); *People v. Kemp*, 49 Ill. App. 3d 270, 364 N.E.2d 944 (1977).

115. *State v. Shockey*, 214 N.W.2d 146 (Iowa 1974).

116. *People v. Neideffer*, 25 Ill. App. 3d 819, 324 N.E.2d 46 (1975). A number of authorities require that the defendant be advised of his speedy trial rights by the court before giving effect to any waiver. See note 112 *supra*.

117. *People v. Wyatt*, 24 Ill. 2d 151, 180 N.E.2d 478 (1962). See also *State v. Wright*, 234 N.W.2d 99 (Iowa 1975) (failure of defendant, in the absence of his counsel, to object to trial setting beyond statutory deadline does not waive right to trial within the period).

118. It is commonly provided that delay caused by a continuance granted at the prosecution's request is to be excluded, for extraconstitutional speedy trial purposes, if the continuance is necessitated by the unavailability of specific evidence, if the prosecution has exercised due diligence to obtain it, and if there is reason to believe it will become available later. Alaska R. Crim. P. 45(d)(3)(a); Ark. R. Crim. P. 28.3(d)(i); Ill. Ann. Stat. ch. 38 § 103-5(c) (Smith-Hurd Supp. 1970); Ind. R. Crim. P. 4(D); Kan. Stat. Ann. § 22-3402(3)(c) (Supp. 1978); Mich. Gen. Ct. R. 789.2(3)(a); Neb. Rev. Stat. § 29-1207(4)(c)(i) (1975); N.Y. Crim. Proc. Law § 30.30(4)(g)(i) (McKinney Supp. 1979).

119. *State ex rel. Butler v. Cullen*, 253 So. 2d 861 (Fla. 1971).

120. *Tarney v. State*, 512 P.2d 923 (Alaska 1973); *People v. Vaughn*, 532 P.2d 782 (Colo. Ct. App. 1975).

121. *United States ex rel. Spina v. McQuillan*, 525 F.2d 813 (2d Cir. 1975).

122. *State v. Belland*, 24 Ariz. App. 87, 535 P.2d 1318 (1975); *State v. Kelley*, 322 So. 2d 581 (Fla. Dist. Ct. App. 1975); *People v. Santa*, 36 Ill. App. 3d 289, 343 N.E.2d 512 (1976); *State v. Taylor*, 47 Ohio App. 2d 171, 352 N.E.2d 604 (1975).

disagrees with defense counsel's action.¹²³ Judicial enforcement of this rule is premised on the pragmatic desire to preclude the possibility that defendant might take advantage of the delay during pendency of the continuance but subsequently renounce it in an effort to obtain a discharge.¹²⁴ This rule does not apply if defense counsel's representation is so ineffective that it warrants description as a farce and a sham.¹²⁵ Where counsel's action is binding on the defendant, the duration of the delay that the defendant is barred from asserting is limited to the term of the continuance, if that is specified;¹²⁶ if the continuance is of uncertain duration, the excluded period of delay is generally the period commencing with issuance of the order of continuance and extending to the first date for which trial is subsequently set.¹²⁷

Following decision on pretrial motions and other contested matters, interlocutory appeals may be filed either by the defense or prosecution. The defendant is not permitted to base claims of speedy trial right denial on delay resulting from such appeals by express provision of many statutes and rules¹²⁸ as well as by judicial construction of nonspecific rules.¹²⁹ Some courts, however, decline to toll time-precise extraconstitutional periods for the duration of any delay caused by unsuccessful prosecution appeals from pretrial rulings favorable to the defendant, placing the risk of extended delay squarely on the government's shoulders.¹³⁰ As a constitutional matter, time reasonably consumed on interlocutory appeal is not considered to be in derogation of a defendant's rights to a speedy trial.¹³¹

123. *Snyder v. State*, 524 P.2d 661 (Alaska 1974); *People v. Wilson*, 40 Cal. App. 3d 913, 115 Cal. Rptr. 619 (1974); *State v. Abrams*, 350 So. 2d 1104 (Fla. Dist. Ct. App. 1977); *People v. Ford*, 34 Ill. App. 3d 79, 339 N.E.2d 293 (1975).

124. *State v. Montgomery*, 232 N.W.2d 525 (Iowa 1975).

125. *Townsend v. Superior Court*, 15 Cal. 3d 774, 543 P.2d 619, 126 Cal. Rptr. 251 (1975); *Nettles v. State*, 164 Ind. App. 205, 327 N.E.2d 625 (1975). Of course, under these circumstances, defendant would by definition have a valid sixth amendment claim of ineffective counsel as well.

126. *State v. Steward*, 168 Mont. 385, 543 P.2d 178 (1975).

127. *State v. Pomeroy*, 18 Wash. App. 837, 573 P.2d 805 (1977).

128. Speedy Trial Act of 1974, 18 U.S.C. § 3161(h)(1)(D) (1976); Alaska R. Crim. P. 45(d)(1); Ariz. R. Crim. P. 8.4(b); Ark. R. Crim. P. 28.3(a); Colo. R. Crim. P. 48(b)(6)(II) & Colo. Rev. Stat. § 18-1-405(6)(b) (1973); Fla. R. Crim. P. 3.191(d)(2)(iv); Ill. Ann. Stat. ch. 38, § 103-5(a), (b), (e) (Smith-Hurd 1970); Mich. Gen. Ct. R. 789.2(1); N.Y. Crim. Proc. Law § 30.30(4)(a) (McKinney Supp. 1979); N.C. Gen. Stat. § 15A-701(b)(1)(c) (1978); Ohio Rev. Code Ann. § 2945.72(E) (Page 1975). These statutes and rules effect the same result whether the interlocutory appeal is taken by the defense or the prosecution.

129. *Matthews v. Superior Court*, 35 Cal. App. 3d 589, 110 Cal. Rptr. 843 (1973); *State v. Williams*, 350 So. 2d 81 (Fla. 1977); *People v. Baskin*, 38 Ill. 2d 141, 230 N.E.2d 208 (1967); *State v. Lewis*, 220 Kan. 791, 556 P.2d 888 (1976); *People v. Hammond*, 84 Mich. App. 60, 269 N.W.2d 488 (1978).

130. *State v. McCarty*, 243 Ind. 361, 185 N.E.2d 732 (1962).

131. *United States v. Cook*, 463 F.2d 123 (5th Cir. 1972); *People v. Hammond*, 84 Mich. App. 60, 269 N.W.2d 488 (1978).

Contemporaneous with, or in lieu of, on-the-record pretrial proceedings there are almost certainly plea negotiations which may introduce attendant delay and necessarily will do so if prosecution is statutorily deferred. It is commonly held that delay directly related to a defendant's voluntary participation in unfruitful plea bargaining cannot be considered in resolving a defendant's subsequent claim that extraconstitutional speedy trial rights were denied.¹³² In most contexts the same rule is applied in constitutional speedy trial right adjudication.¹³³ The prosecution's unilateral, unsuccessful attempts to negotiate with the defendant, however, will not effect a forfeiture of any speedy trial rights absent an affirmative misrepresentation by the defendant, relied upon by the prosecution, that such unilateral efforts will not be made in vain.¹³⁴ If, rather than culminating in a guilty plea, negotiations lead toward statutory deferral of prosecution, the concomitant delay customarily must be waived, for all speedy trial purposes, pursuant to the applicable deferral statute.¹³⁵ This sort of compelled waiver has been upheld in the face of constitutional attack.¹³⁶

Should plea negotiations not resolve the litigation, trial may give rise to defense motions for mistrial, new trial, post-conviction appeal or collateral attack. If either motion is granted, or appeal or collateral attack is successful, two issues arise: whether defendant must be retried within any applicable extraconstitutional period, and the constitutional ramifications. Quite simply, both cases and statutes/rules provide that the declaration of a mistrial or new trial, or appellate reversal and remand of a conviction for retrial, sparks revival of a defendant's constitutional¹³⁷ and extraconstitutional¹³⁸ speedy trial

132. This result obtains where defense and prosecution are unable to agree, *United States v. Johnson*, 525 F.2d 999 (2d Cir. 1975), *cert. denied*, 424 U.S. 920 (1976); *United States v. Valot*, 481 F.2d 22 (2d Cir. 1973), as well as where any agreement between the parties is rejected by the court, *State v. Daskocil*, 113 Ariz. 413, 555 P.2d 659 (1976), or the plea, once entered, is withdrawn, *Wilkinson v. State*, 322 So. 2d 620 (Fla. Dist. Ct. App. 1975); Speedy Trial Act of 1974, 18 U.S.C. § 316(i) (1976); N.C. Gen. Stat. § 15A-701(c) (1978).

133. *United States v. Key*, 458 F.2d 1189 (10th Cir.), *cert. denied*, 408 U.S. 927 (1972). *But see United States v. Roberts*, 515 F.2d 642 (2d Cir. 1975) (extenuating circumstance: because of extended delay, defendant aged beyond eligibility for youthful offender status depriving him of opportunities for probation/record expungement).

134. *Jaramillo v. District Court*, 174 Colo. 561, 484 P.2d 1219 (1971) (en banc) (state and federal constitutional/state statutory and rule rights at issue); *Commonwealth v. Donati*, 373 Mass. 769, 369 N.E.2d 1139 (1977) (statutory right at issue).

135. See, e.g., *People v. Ybarra*, 190 Colo. 409, 547 P.2d 925 (1976); *Johns v. State*, 340 So. 2d 528 (Fla. Dist. Ct. App. 1976); Conn. Gen. Stat. Ann. § 54-76p (West Supp. 1979): "Any defendant who enters such program shall agree to . . . waiver of his right to a speedy trial . . ."

136. *Morse v. Municipal Court*, 13 Cal. 3d 149, 529 P.2d 46, 118 Cal. Rptr. 14 (1974).

137. *United States v. Didier*, 542 F.2d 1182 (2d Cir. 1976); *State v. Wright*, 234 N.W.2d 99 (Iowa 1975).

138. This result is dictated both by express statutory/rule provisions, Speedy Trial Act of 1974, 18 U.S.C. § 3161(e) (1976); Alaska R. Crim. P. 45(c)(2); Ariz. R. Crim. P. 8.2(d); Ark. R.

rights, even if they were previously waived by the defendant. Where retrial is ordered by a higher court following direct appeal, the delay immediately occasioned by the course of appellate proceedings is not deemed violative of any of the defendant's speedy trial rights.¹³⁹

2. Defense Failure to Prevent Delay

In a number of factual contexts the defense, while not the immediate cause of delay, could act affirmatively to prevent the delay from occurring but does not do so. Prior to *Barker v. Wingo*, defense inaction, in failing to demand a speedy trial, alone cemented defendant's waiver of his speedy trial rights in most jurisdictions.¹⁴⁰ The *Barker* opinion abrogated this demand-waiver rule in constitutional adjudication,¹⁴¹ but retained non-assertion of defendant's right as one factor to be considered in determining whether the sixth amendment speedy trial right has been denied.¹⁴² In constitutional practice, however, virtually all courts still decline to discharge a defendant on the basis of constitutional speedy trial deprivation unless the defense has taken affirmative action to obtain a speedy trial,¹⁴³ except in extraordinary circumstances.¹⁴⁴ The demand-waiver rule has, to a limited extent,¹⁴⁵ survived extraconstitutionally, most notably in those jurisdictions with demand-triggered speedy trial rights.¹⁴⁶

Crim. P. 28.2(c); Cal. Penal Code § 1382(2)-(3) (West Supp. 1979); Colo. R. Crim. P. 48(b)(6)(V) & Colo. Rev. Stat. § 18-1-405(6)(e) (1973); Fla. R. Crim. P. 3.191(g); Kan. Stat. Ann. § 22-3402(4) (Supp. 1978); La. Code Crim. Proc. Ann. art. 582 (West 1967); Mo. Ann. Stat. § 545.780(4) (Vernon Supp. 1980); N.M. R. Crim. P. (Dist. Ct.) 37(b); N.Y. Crim. Proc. Law § 30.30(5)(a) (McKinney Supp. 1979); N.C. Gen. Stat. § 15A-701(a)(4)-(5) (1978); Pa. R. Crim. P. 1100(e), and judicial construction of statutes/rules silent on the point, *Adams v. State*, 129 Ga. App. 839, 201 S.E.2d 649 (1973); *People v. Johnson*, 36 Ill. App. 3d 122, 343 N.E.2d 177 (1976).

139. *Harrison v. United States*, 392 U.S. 219, 221 n.4 (1968) (federal constitutional right); *United States v. Robles*, 563 F.2d 1308 (9th Cir. 1977) (same), *cert. denied*, 435 U.S. 925 (1978); *State ex rel. Simonds v. Hall*, 326 So. 2d 443 (Fla. Dist. Ct. App. 1976) (state statutory right).

140. *Barker v. Wingo*, 407 U.S. 514, 523-25 (1972).

141. *Id.* at 528.

142. *Id.* at 530.

143. Thus if defendant has not asserted this right, it is unlikely to be deemed violated. *See, e.g.,* *McDavid v. State*, 57 Ala. App. 64, 326 So. 2d 31 (Crim. App. 1976); *State v. Steward*, 168 Mont. 385, 543 P.2d 178 (1975); *Constabile v. State*, 513 P.2d 588 (Okla. Crim. App. 1973).

144. Such extraordinary circumstances include situations in which defendant is without counsel and there is no suggestion that he employed delaying tactics, *State v. Steeves*, 383 A.2d 1379 (Me. 1978), or where defense counsel is incompetent, *Hipp v. State*, 75 Wis. 2d 621, 250 N.W.2d 299, *cert. denied*, 434 U.S. 849 (1977), or where defendant operated under the misapprehension that the case against him had been dismissed, *State v. Ziegenhagen*, 73 Wis. 2d 656, 245 N.W.2d 656 (1976). *See also* *Barker v. Wingo*, 407 U.S. 514, 529 (1972).

145. *But see* note 38 *supra*.

146. *See* Fla. R. Crim. P. 3.191(a)(2); Ga. Code § 27-1901, -1901.1 (1978); Ill. Ann. Stat. ch. 38, § 103-5 (Smith-Hurd 1970 & Supp. 1979); Ind. R. Crim. P. 4(B); Minn. R. Crim. P. 11.10; R.I. Gen. Laws § 12-13-7 (Supp. 1978); S.C. Code § 17-23-90 (1976); Wis. Stat. § 971.10(2)(a) (West Supp. 1979-1980). *See also* *Smith v. State*, 258 Ark. 533, 528 S.W.2d 359 (1975); *Dansby v. State*, 140 Ga. App. 104, 230 S.E.2d 64 (1976).

Moreover, a variant of the demand-waiver rule, that precludes a defendant from asserting speedy trial right denial absent affirmative action by demand, is enforced in at least one situation under non-demand, time-precise enactments. Where the court schedules trial beyond the applicable time limits and defense counsel fails to so apprise the court, defense inaction is deemed acquiescence in the scheduled date and the defendant is foreclosed from successfully asserting extraconstitutional speedy trial right denial.¹⁴⁷ No such waiver, however, results from inaction of a defendant who is neither represented nor appears personally under similar circumstances.¹⁴⁸

If the defendant's negligence occasions delay, he is generally precluded from asserting that his extraconstitutional speedy trial has been violated as a result. For example, in addition to the procedural defaults discussed earlier,¹⁴⁹ the failure of a defendant experiencing delay to adhere to prescribed statutory or rule procedure for securing a speedy trial leads to a forfeiture of his statutory or rule right.¹⁵⁰ In the same manner it is held that delay engendered by defense failure to comply with prosecution discovery requests cannot properly form the basis of assertions of speedy trial right denial.¹⁵¹ Certain speedy trial statutes and rules, moreover, specifically preclude defendants from successfully raising claims of right denial as a result of delay arising from the defendant's neglect.¹⁵²

3. Unpreventable Delay Due to Circumstances Beyond Defendant's Control

Circumstances which are, strictly speaking, beyond the control of the defendant or defense counsel often generate pretrial delay. Some of these are, in varying degrees of immediacy and directness, traceable to the defendant's criminal conduct, while others stand more or less fully unrelated. When this dichotomy is applied analytically, uniformity is discernible in the cases in which delay stems from the defendant's criminal conduct, regardless of whether it is related to the instant

147. *Hodge v. State*, 264 Ind. 377, 344 N.E.2d 293 (1976); *State v. Potts*, 240 N.W.2d 654 (Iowa 1976); *State v. Westbrook*, 47 Ohio App. 2d 211, 353 N.E.2d 637 (1975). *But see* *Harrington v. District Court*, 192 Colo. 351, 559 P.2d 225 (1977); *State v. Ansley*, 349 So. 2d 837 (Dist. Ct. App. 1977), *cert. denied*, 359 So. 2d 1220 (Fla. 1978); *State v. Alvarez*, 189 Neb. 281, 202 N.W.2d 604 (1972).

148. *State v. Wright*, 234 N.W.2d 99 (Iowa 1975).

149. See text accompanying notes 54-64 *supra*.

150. *State v. Dolack*, 216 Kan. 622, 533 P.2d 1282 (1975); *State v. Wright*, 290 N.C. 45, 224 S.E.2d 624 (1976), *cert. denied*, 429 U.S. 1049 (1977).

151. *People v. Murphy*, 47 Ill. App. 3d 278, 361 N.E.2d 842 (1977), *aff'd*, 72 Ill. 2d 421, 381 N.E.2d 677 (1978).

152. Cal. Penal Code § 1382(2)-(3) (West Supp. 1979); Ohio Rev. Code Ann. § 2945.72(D) (Page 1975).

prosecution. Delay spawned by more neutral circumstances, however, produces considerable unpredictability in result forecasting.

To the extent that pretrial delay can be traced directly to the criminal conduct for which charges are pending, the delay is generally considered not to be in derogation of the defendant's speedy trial rights. This rule is applied, for example, when delay emanates from the complexity of the crime at issue and the consequent need for protracted investigation;¹⁵³ from the aftermath of the conduct, such as necessary convalescence of injured victims or witnesses who are lengthily incapacitated from testifying at trial;¹⁵⁴ and from related criminal,¹⁵⁵ and occasionally civil,¹⁵⁶ proceedings that arise from the charged criminal conduct and that will dispose of pivotal legal issues. Similarly, if the defendant is charged with an offense when his codefendant is ill,¹⁵⁷ missing,¹⁵⁸ or may permissibly be tried after the

153. Speedy Trial Act of 1974, 18 U.S.C. § 3161(h)(8)(B)(ii) (1976); Alaska R. Crim. P. 45(d)(3)(b); Ariz. R. Crim. P. 8.1(e); Ark. R. Crim. P. 28.3(d)(ii); Colo. R. Crim. P. 48(b)(6)(VII)(B) & Colo. Rev. Stat. § 18-1-405(6)(g)(II) (1973); Mich. Gen. Ct. R. 789.2(3); Neb. Rev. Stat. § 29-1207(4)(c)(ii) (1975); N.Y. Crim. Proc. Law § 30.30(4)(g)(ii) (McKinney Supp. 1979); N.C. Gen. Stat. § 15A-701(b)(7)(b) (Supp. 1979). *See also* provisions cited note 118 *supra*. The decisions reach the same result. *United States v. Avalos*, 541 F.2d 1100 (5th Cir. 1976) (federal constitutional right), *cert. denied*, 430 U.S. 970 (1977); *United States v. Stoker*, 522 F.2d 576 (10th Cir. 1975) (same); *United States v. Rollins*, 487 F.2d 409 (2d Cir. 1973) (rule right); *State v. Alfred*, 337 So. 2d 1049 (La. 1976); *Commonwealth v. Boyd*, 367 Mass. 169, 326 N.E.2d 320 (1975); *People v. Taranovich*, 37 N.Y.2d 442, 335 N.E.2d 303, 373 N.Y.S.2d 79 (1975) (federal constitutional and state statutory rights). *See generally* *Barker v. Wingo*, 407 U.S. 514, 531 (1972) ("the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge"). However, the length of acceptable delay for extended investigation or prosecution preparation is in some jurisdictions expressly limited. Colo. R. Crim. P. 48(b)(6)(VII) & Colo. Rev. Stat. § 18-1-405(6)(g) (1973) (six months); Ill. Ann. Stat. ch. 38, § 103-5(c) (Smith-Hurd 1970) (60 days); Ind. R. Crim. P. 4(D) (90 days); Kan. Stat. Ann. § 22-3402(3)(c) (Supp. 1978) (120 days). *See also* note 111 *supra* (provisions of more general applicability, with like result).

154. *Torres v. Florida*, 477 F.2d 555 (5th Cir.), *cert. denied*, 414 U.S. 852 (1973); *People v. Goodman*, 41 N.Y.2d 888, 362 N.E.2d 615, 393 N.Y.S.2d 985 (1977).

155. *People v. Rarback*, 40 N.Y.2d 922, 923, 358 N.E.2d 267, 267, 389 N.Y.S.2d 574, 575 (1976) (mem.) ("the protracted pendency of appeals in directly related cases involving the admissibility in this case of crucial evidence, properly moved the courts below to conclude that this defendant was not denied his [federal] constitutional or [state] statutory right to a speedy trial"). However, the mere pendency of an appeal, in an unrelated criminal action, which might prompt appellate discussion of germane issues does not, automatically, toll defendant's speedy trial right. *People v. Gandhi*, 84 Misc. 2d 231, 375 N.Y.S.2d 556 (Sup. Ct. 1975) (statutory right at issue); *cf. People v. Panarella*, 50 A.D.2d 304, 377 N.Y.S.2d 709 (3d Dep't 1975) (defense counsel's acquiescence in continued pendency of state prosecution during concurrent federal proceedings effectively waived defendant's right to a federal constitutional/state statutory speedy trial).

156. *United States v. Atkins*, 528 F.2d 1352 (5th Cir.) (delay in draft evasion prosecution due to government's desire to await resolution of defendant's draft classification in contemporaneous civil action violates none of defendant's speedy trial rights), *cert. denied*, 429 U.S. 939 (1976).

157. *Batey v. Superior Court*, 71 Cal. App. 3d 952, 139 Cal. Rptr. 689 (1977) (state statutory right at issue).

158. *United States v. Avalos*, 541 F.2d 1100 (5th Cir. 1976) (federal constitutional right involved), *cert. denied*, 430 U.S. 970 (1977).

defendant's time-precise period expires,¹⁵⁹ the resulting delay neither causes nor contributes to any violation of the defendant's speedy trial rights, provided there exists good cause for not severing the joint indictment or information.¹⁶⁰

If extraneous criminal conduct of defendant provokes delay—that is, criminal conduct other than that at issue in the litigation in which speedy trial claims are raised—that delay is not deemed to deprive a defendant of his rights to a speedy trial. Such nonviolative delay commonly arises when the defendant is tried on other charges during the pretrial period.¹⁶¹ The mere incarceration of the defendant following conviction of another crime, however, does not constitutionally excuse the failure to try him speedily. It may, indeed, serve to secure additional extraconstitutional speedy trial rights to the defendant.¹⁶²

159. Speedy Trial Act of 1974, 18 U.S.C. § 3161(h)(7) (1976); Alaska R. Crim. P. 45(d)(5); Ariz. R. Crim. P. 8.4(e); Ark. R. Crim. P. 28.3(g); Colo. R. Crim. P. 48(b)(6)(III) & Colo. Rev. Stat. § 18-1-405-(6)(c) (1973); Fla. R. Crim. P. 3.191(f)(v); Mich. Gen. Ct. R. 789.2(4); Mo. Ann. Stat. § 545.780(3)(4) (Vernon Supp. 1980); Neb. Rev. Stat. § 29-1207(4)(e) (1975); N.Y. Crim. Proc. Law. § 30.30(4)(d) McKinney Supp. 1979; N.C. Gen. Stat. § 15A-701(b)(6) (Supp. 1979); cf. Va. Code § 19.2-243(3) (1975) (delay caused by separate trial ordered at request of codefendant jointly indicted with defendant).

160. Illustrative of decisions compelling severance is *State v. Rueckert*, 221 Kan. 727, 561 P.2d 850 (1977), which held that defendant's statutory right to a speedy trial within a defined period "could not be sacrificed merely because defendant was undergoing a competency determination." *Id.* at 731, 561 P.2d at 855. Consequently, the court allowed severance. *Id.*

161. *United States v. Cook*, 463 F.2d 123 (5th Cir. 1972) (constitutional rights); *Arnold v. State*, 239 Ga. 752, 238 S.E.2d 876 (1977); *State v. King*, 225 N.W.2d 337 (Iowa 1975); *Speedy Trial Act of 1974*, 18 U.S.C. § 3161(h)(1)(c) (1976); Alaska R. Crim. P. 45(d)(1); Ark. R. Crim. P. 28.3(a); Ill. Ann. Stat. ch. 38, § 103-5(e) (Smith-Hurd 1970); Mich. Gen. Ct. R. 789.2(1); Mo. Ann. Stat. § 545.780(3)(1)(b) (Vernon Supp. 1980); Neb. Rev. Stat. § 29-1207(4)(a) (1975); N.C. Gen. Stat. § 15A-701(b)(1)(b) (Supp. 1979); Ohio Rev. Code Ann. § 2945.72(A) (Page 1975); Wash. R. Crim. P. 3.3(d)(2).

162. *Dickey v. Florida*, 398 U.S. 30 (1970) (federal constitutional right); *Smith v. Hooey*, 393 U.S. 374 (1969) (same); *Barker v. Municipal Court*, 64 Cal. 2d 806, 415 P.2d 809, 51 Cal. Rptr. 921 (1966) (state constitutional and statutory rights); *State v. Hamilton*, 268 N.W.2d 56 (Minn. 1978) (state and federal constitutional rights); *People v. Winfrey*, 20 N.Y.2d 138, 228 N.E.2d 808, 281 N.Y.S.2d 823 (1967) (state statutory right); *Commonwealth v. Clark*, 443 Pa. 318, 279 A.2d 41 (1971) (state and federal constitutional rights, and statutory rights). Moreover, the Interstate Agreement on Detainers and the Uniform Mandatory Disposition of Detainers Act provide extraconstitutional mechanisms through which incarcerated defendants may insist upon, or are automatically entitled to, speedy trial on charges pending in a foreign or home jurisdiction. Other speedy trial statutes and rules similarly confer additional extraconstitutional protection upon incarcerated defendants. For example, many provide that defendants in custody are to receive preferences in the setting of dates for trial over non-custodial defendants. Alaska R. Crim. P. 45(a); Ariz. R. Crim. P. 8.1(b); Ark. R. Crim. P. 27.1(b); Mich. Gen. Ct. R. 789.1(2); Neb. Rev. Stat. § 29-1205(2) (1975); N.Y. Crim. Proc. Law § 30.20(2) (McKinney Supp. 1979). Others confer upon incarcerated defendants the right to trial within a fixed time period shorter than that within which noncustodial defendants must be tried. Ariz. R. Crim. P. 8.2(b)-(c) (the shorter of 60 days from arraignment or 90 days from initial appearance if defendant is incarcerated; if defendant is at liberty or on bail the period is the shorter of 120 days from initial appearance or 90 days from arraignment); Ark. R. Crim. P. 28.1(b)-(c) (trial within nine months or by end of second full term of court following arrest or charging of incarcerated defendant; trial by end of

Yet the pretrial delay incident to the defendant's detention in another jurisdiction, even absent defense resistance to extradition,¹⁶³ will often be excluded from the time-precise period within which trial must commence.¹⁶⁴ The same result obtains under constitutional provisions.¹⁶⁵

Pretrial delay growing out of circumstances neither within the defendant's control nor proximately traceable to his criminal conduct is treated by the courts in a less uniform manner. Certain statutes or rules state that delay occasioned by trial calendar congestion may, in various situations or under select conditions, be carved out in calculating whether applicable prescribed periods for trial have elapsed.¹⁶⁶ Others dictate that in no case may such delay be carved out and thereby tolerated.¹⁶⁷ The decisions interpreting nonspecific extraconstitutional rights come down on both sides of the issue, some effectively excluding such delay from consideration in measuring expiration of time-precise periods,¹⁶⁸ others refusing to exclude it.¹⁶⁹

third full court term if defendant is at liberty or on bail); Ill. Ann. Stat. ch. 38, § 103-5(a)-(b) (Smith-Hurd 1970) (120 vs. 160 days); Ind. R. Crim. P. 4(A), (C) (six months vs. one year); Kan. Stat. Ann. § 22-3402(1)-(2) (Supp. 1978) (90 vs. 180 days). Utah Code Ann. § 77-1-8(6) (1978) (30 days vs. first day of next succeeding court session); Va. Code § 19.2-243 (1975) (five vs. nine months). Finally, a number of extraconstitutional speedy trial rights, or provisions, inure to the benefit of incarcerated defendants exclusively. Ill. Ann. Stat. ch. 38, § 103-5(a) (Smith-Hurd 1970) (incarcerated defendants receive the benefit of a non-demand speedy trial right with its shorter fixed-time period); Ind. R. Crim. P. 4(B) (incarcerated defendant has the right to move for early trial; defendant will be discharged if trial does not occur within 70 days); S.C. Code § 17-23-90 (1977) (only "committed" defendant given right to demand speedy trial). *But see* Fla. R. Crim. P. 3.191(a)(1), (b)(1)-(2) (permitting longer pretrial delay when defendant is in custody than when he is not).

163. See notes 89-92 *supra* and accompanying text.

164. Alaska R. Crim. P. 45(d)(6) (if prosecution has exercised due diligence in securing defendant's presence for trial and filed a detainer concerning the pending charges); N.Y. Crim. Proc. Law § 30.30(4)(e) (McKinney Supp. 1979) (same conditions); N.C. Gen. Stat. § 15A-701(b)(9) (Supp. 1979) (where defendant is incarcerated in a jurisdiction other than the jurisdiction in which the criminal offense is to be tried); Ohio Rev. Code Ann. § 2945.72(A) (Page 1975) (reasonable diligence of prosecutor).

165. Presumably any such delay would be neutral—that is, not weighed against the prosecution in any *Barker v. Wingo* balancing analysis—and would consist exclusively of a "period [that] was reasonable and necessary for the orderly disposition of the case." *Hipp v. State*, 75 Wis. 2d 621, 628, 250 N.W.2d 299, 303 (state and federal constitutional rights), *cert. denied*, 434 U.S. 849 (1977).

166. Ariz. R. Crim. P. 8.4(c) (if extraordinary circumstances exist and the state's supreme court chief justice suspends the rule period); Ark. R. Crim. P. 28.3(b) (if exceptional circumstances exist and the court so orders); Ind. R. Crim. P. 4(A) (state must demonstrate that it is not responsible for the delay); Kan. Stat. Ann. § 22-3402(3)(d) (Supp. 1978) (only one continuance, up to 30 days in length, permitted).

167. Speedy Trial Act of 1974, 18 U.S.C. § 3161(h)(8)(C) (1976); Mich. Gen. Ct. R. 789.2(5); Mo. Ann. Stat. § 545.780(3)(5)(b) (Vernon Supp. 1980).

168. *United States v. Methven*, 547 F.2d 896 (5th Cir. 1977) (*per curiam*); *People v. Yniquez*, 42 Cal. App. 3d Supp. 13, 116 Cal. Rptr. 626 (1974); *People v. Ganci*, 27 N.Y.2d 418, 267 N.E.2d 263, 318 N.Y.S.2d 484, *cert. denied*, 402 U.S. 924 (1971); *State v. Lee*, 48 Ohio St. 2d 208, 357 N.E.2d 1095 (1976).

Similar discord is evident in constitutional adjudication. Most courts, following the Supreme Court's initiative, rule that delay resulting from overcrowded dockets is to be placed in the *Barker v. Wingo*¹⁷⁰ balance but "weighed less heavily than intentional delay."¹⁷¹ Others refuse to consider such delay an adequate ground for denying a speedy trial to a defendant who actively pursues his constitutional right.¹⁷² Yet others maintain that the constitutional provision requires only that trial be held consistent with the court's caseload.¹⁷³

Should the defendant's incompetence to stand trial cause delay, such delay is uniformly deemed neither to cause nor contribute to denial of a defendant's speedy trial rights. Most extraconstitutional rights expressly exclude from judicial consideration any period during which the defendant is incompetent to stand trial,¹⁷⁴ including the delay due to competency hearings and examinations.¹⁷⁵ Nonspecific statutes and rules are similarly construed.¹⁷⁶ Constitutionally, the courts generally decline to consider the time which elapses while the defendant is

169. *United States v. Ford*, 550 F.2d 732 (2d Cir. 1977), *aff'd sub nom. United States v. Mauro*, 436 U.S. 340 (1978); *United States v. Drummond*, 511 F.2d 1049 (2d Cir.), *cert. denied*, 423 U.S. 844 (1975); *Carr v. District Court*, 190 Colo. 125, 543 P.2d 1253 (1975) (en banc); *State v. Wright*, 234 N.W.2d 99 (Iowa 1975); *State v. Durham*, 13 Wash. App. 675, 537 P.2d 816 (1975).

170. 407 U.S. 514 (1972).

171. *Strunk v. United States*, 412 U.S. 434, 436 (1973); *cf. Jones v. State*, 279 Md. 1, 367 A.2d 1 (shortage of trial judges), *cert. denied*, 431 U.S. 915 (1977); *People v. Johnson*, 38 N.Y.2d 271, 342 N.E.2d 525, 379 N.Y.S.2d 735 (1975) (shortage of prosecutors); *Scarborough v. State*, 76 Wis. 2d 87, 250 N.W.2d 354 (1977) (calendar congestion).

172. *Commonwealth v. Beckett*, 373 Mass. 329, 366 N.E.2d 1252 (1977).

173. *People v. O'Neill*, 185 Colo. 202, 523 P.2d 123 (1974) (en banc).

174. Speedy Trial Act of 1974, 18 U.S.C. § 3161(h)(4) (1976); Alaska R. Crim. P. 45(d)(1); Ariz. R. Crim. P. 8.4(a); Ark. R. Crim. P. 28.3(a); Colo. R. Crim. P. 48(b)(6)(I) & Colo. Rev. Stat. § 18-1-405(6)(a) (1973); Ill. Ann. Stat. ch. 38, § 103-5(a), (b), (e) (Smith-Hurd 1970); Kan. Stat. Ann. § 22-3402(3)(b) (Supp. 1979); La. Code Crim. Proc. Ann. art. 579(2) (West 1967); Mich. Gen. Ct. R. 789.2(1); Mo. Ann. Stat. § 545.780(3)(3) (Vernon Supp. 1980); Neb. Rev. Stat. § 29-1207(4)(a) (1975); N.Y. Crim. Proc. Law § 30.30(4)(a) (McKinney Supp. 1979); N.C. Gen. Stat. § 15A-701(b)(4) (Supp. 1979); Ohio Rev. Code Ann. § 2945.72(B) (Page Supp. 1979); Va. Code § 19.2-243(1) (1975); W. Va. Code § 62-3-21 (1977). Some statutes and rules specifically exclude delay caused by defendant's physical illness or disability, even though such would seem a variety of "incompeten[ce]." Speedy Trial Act of 1974, 18 U.S.C. § 3161(h)(4) (1976); Colo. R. Crim. P. 48(b)(6)(I) & Colo. Rev. Stat. § 18-1-405 (6)(a) (1973); Mo. Ann. Stat. § 545.780(3)(3) (Vernon Supp. 1980); N.C. Gen. Stat. § 15A-701(b)(4) (Supp. 1979); Ohio Rev. Code Ann. § 2945.72(B) (Page 1975); Va. Code § 19.2-243(1) (1975); *cf. Ill. Ann. Stat. ch. 38, § 103-5(a), (b), (e) (Smith-Hurd 1970)* (delay generated by continuance due to defendant's physical incapacity is excluded in computing statutory trial period). Both the Interstate Agreement on Detainers art. VI(a) and the Uniform Mandatory Disposition of Detainers Act § 5 exclude from judicial concern that period of delay caused by defendant's being "unable to stand trial." However, neither of these enactments applies "to any person adjudged to be mentally ill." Interstate Agreement on Detainers art. VI(b); Uniform Mandatory Disposition of Detainers Act § 5.

175. See note 102 *supra*.

176. *State v. Reynolds*, 250 N.W.2d 434 (Iowa 1977) (physical inability); *State v. Watts*, 244 N.W.2d 586 (Iowa 1976) (psychiatric evaluation).

incompetent to testify as "delay" within *Barker's* "length of delay" factor,¹⁷⁷ although extreme facts breed exceptional results.¹⁷⁸

The illness or unavailability of material prosecution witnesses or other persons necessary for trial is a circumstance, beyond the defense's control, that recurrently results in delay. Express provisions in many time-precise statutes or rules exclude from judicial consideration, for purposes of computing prescribed time periods, such delay when the absent person is a prosecution witness.¹⁷⁹ These exclusions do not apply when the absentee is a judge or prosecutor.¹⁸⁰ Defense counsel's illness or unavailability ordinarily constitutes good cause, excusing the failure to try the defendant within the prescribed period,¹⁸¹ but this delay may be considered in derogation of the defendant's extraconstitutional right if counsel is publicly provided.¹⁸² Indeed, even if the absence of a material prosecution witness causes the delay, prosecution dilatoriness or neglect in attempting to secure the witness's attendance,¹⁸³ as well as defense perspicacity in offering to stipulate to the missing witness's testimony,¹⁸⁴ may result in a speedy

177. *Ricon v. Garrison*, 517 F.2d 628 (4th Cir.), *cert. denied*, 423 U.S. 895 (1975); *United States v. Canty*, 469 F.2d 114 (D.C. Cir. 1972); *State v. Owens*, 112 Ariz. 223, 540 P.2d 695 (1975); *State ex rel. Haskins v. County Courts*, 62 Wis. 2d 250, 214 N.W.2d 575 (1974).

178. *See, e.g., United States v. Geelan*, 520 F.2d 585 (9th Cir. 1975); *Cox v. State*, 550 S.W.2d 954 (Tenn. Crim. App. 1976).

179. This situation is contemplated by the statutory and rule provisions already discussed note 153 *supra*, and is expressly the subject of Mo. Ann. Stat. § 545.780(3)(2) (Vernon Supp. 1980); N.C. Gen. Stat. § 15A-701(b)(3) (Supp. 1979); R.I. Gen. Laws § 12-13-7 (Supp. 1979); Va. Code § 19.2-243(2) (1975); W. Va. Code § 62-3-21 (1977).

180. The decisions are not uniform in assessing the weight to be accorded the absence or unavailability of a judge or prosecutor. *Compare State v. Jennings*, 195 N.W.2d 351 (Iowa 1972) (judge) and *People v. Adams*, 59 Ill. App. 3d 590, 375 N.E.2d 893 (1978) (prosecutor) with *State v. Newman*, 257 N.W.2d 29 (Iowa 1977) (prosecutor) and *People v. Hamilton*, 61 A.D.2d 1112, 403 N.Y.S.2d 372 (3d Dep't 1978) (judge), *rev'd on other grounds per curiam*, 46 N.Y.2d 932, 388 N.E.2d 345, 415 N.Y.S.2d 208 (1979).

181. *People v. Superior Court*, 48 Cal. App. 3d 1003, 122 Cal. Rptr. 267 (1975); *People v. Hairston*, 46 Ill. 2d 348, 263 N.E.2d 840 (1970), *cert. denied*, 402 U.S. 972 (1971). *State v. Pomeroy*, 18 Wash. App. 837, 573 P.2d 805 (1977).

182. *Compare People v. Beyah*, 67 Ill. 2d 423, 367 N.E.2d 1334 (1977) (appointed defense counsel's unavailability not attributable to defendant) with *People v. Superior Court*, 48 Cal. App. 3d 1003, 122 Cal. Rptr. 267 (1975) (appointed defense counsel's unavailability constitutes "good cause" for delay beyond statutory period where no other public defender is available to represent defendant).

183. *People v. Shannon*, 34 Ill. App. 3d 185, 340 N.E.2d 129 (1975) (prosecution's failure to attempt to locate two police eyewitnesses until four days before trial, by which time both were on extended furloughs, was insufficient to justify continuance beyond statutory period); *State v. Driever*, 347 So. 2d 1132 (La. 1977) (state's failure to attempt, in a timely manner, to locate material witness renders that witness's absence an invalid excuse for delay beyond statutory period); *People v. Bermudez*, 84 Misc. 2d 1071, 377 N.Y.S.2d 899 (Sup. Ct. 1975) (prosecution's inability to locate material witness over thirteen months through four continuances, coupled with prosecution's continued ignorance of witness's whereabouts, warrants dismissal for speedy trial violation).

184. *People v. Grant*, 42 Ill. App. 3d 790, 356 N.E.2d 933 (1976) (unavailability of

trial right violation. Supreme Court dictum, moreover, constitutionally excuses "appropriate delay" due to material witness unavailability.¹⁸⁵ The cases follow this dictum,¹⁸⁶ devoting conspicuous attention to evaluation of any delay's "appropriate[ness]."¹⁸⁷ The illness or unavailability of the assigned trial judge is, like prosecutor absence, weighed against the prosecution in striking the *Barker* balance.¹⁸⁸ Viewed together with other reasons for the delay, however, it may not violate a constitutional right.¹⁸⁹

Finally, a prosecutor may elect to dismiss the original charges against the defendant and subsequently reindict or refile charges based upon the same conduct. In this context, the issue arises whether the defendant's speedy trial rights attach as of the date of the first or second set of charges. Under statutes and rules, the authorities diverge. Some jurisdictions require that trial commence within the prescribed time period, as customarily computed, following the original accusation of the defendant, but proceed to exclude the time elapsing between dismissal of the original charges and subsequent reindictment or refiling.¹⁹⁰ Other jurisdictions commence computation of the prescribed time period anew upon reindictment or the second filing of charges.¹⁹¹ Still others provide for a combination of the foregoing¹⁹² or simply prohibit reaccusation of the defendant for the same conduct.¹⁹³ The constitutional authorities are uniform: a defendant's federal¹⁹⁴ and state¹⁹⁵ constitutional speedy trial rights attach as soon as he is accused. Nevertheless, the defendant's voluntary and intelligent agreement to dismissal of charges, with awareness that he will stand reaccused as a result of the same conduct, constitutes a waiver of the consequent delay.¹⁹⁶

prosecution witness does not justify continuance beyond statutory period where defendant offers to stipulate to missing witness' testimony), *rev'd on other grounds*, 68 Ill. 2d 1, 368 N.E.2d 909 (1977).

185. *Barker v. Wingo*, 407 U.S. 514, 531 (1972).

186. *See, e.g., United States v. Fasanaro*, 471 F.2d 717 (2d Cir. 1973); *Green v. State*, 75 Wis. 2d 631, 250 N.W.2d 305, *cert. denied*, 434 U.S. 841 (1977).

187. *See People v. Bermudez*, 84 Misc. 2d 1071, 377 N.Y.S.2d 899 (Sup. Ct. 1975).

188. *People v. Broyer*, 394 Mich. 107, 228 N.W.2d 780 (1978); *Hadley v. State*, 66 Wis. 2d 350, 225 N.W.2d 461 (1975).

189. *United States v. Latimer*, 548 F.2d 311, 313-14 (10th Cir. 1977).

190. 18 U.S.C. § 3161(h)(6) (1976); N.C. Gen. Stat. § 15A-701(b)(5) (Supp. 1979); Wash. R. Crim. P. 3.3(e)(4).

191. *See Crockett v. Superior Court*, 14 Cal. 3d 433, 535 P.2d 321, 121 Cal. Rptr. 457 (1975).

192. Ark. R. Crim. P. 28.2(b), 28.3(f) (if original charges dismissed on defendant's motion, speedy trial period commences anew on the date defendant is re-charged or arrested; if original charges dismissed on state's motion, only the period between dismissal of first charges and refiling is excluded in computing the period of delay).

193. Nev. Rev. Stat. § 178.562(1) (1973).

194. *United States v. Marion*, 404 U.S. 307, 313 (1971).

195. *See note 1 supra*.

196. *United States v. Green*, 526 F.2d 212 (8th Cir. 1975).

III. THE ILLUSIVE RIGHT TO A SPEEDY TRIAL

Philosophers and historians of science are fond of remarking on the common misapprehension that, because one has a name for something, one necessarily understands what it is. Plainly many who discuss the "right to a speedy trial" as if discussing a unitary right fail to appreciate that subsumed under that descriptive label are at least four discrete categories of rights,¹⁹⁷ each of which is of different dimension, susceptible of distinct methods and nuances of interpretation, and not necessarily related to each of the others. Such discrimination is a prerequisite to understanding the full parameters and implications of the speedy trial guarantee. The absence of such understanding has repercussions on the degree to which speedy trial rights, in application, secure speedy trials.

Presently, the speedy trial guarantee is not so much "amorphous"¹⁹⁸ as unsubstantial. In its various forms, it prods the parties toward trial at some indefinite point in the presumably foreseeable future following accusation of defendant. It achieves this, however, only at the expense of rendering litigable virtually all delay, consequently promoting an enormous volume of litigation.

A review of the various rights—as literally enacted and promulgated, and as construed—suggests some approaches, judicial and legislative, that may be more conducive to speedy criminal trials. As a preliminary matter, conceptual precision concerning the nature and scope of the right at issue is paramount. The right secured by the sixth amendment provides ultimate speedy trial protection; irrespective of extraconstitutional, or even state constitutional, protections, the federal right confers on courts the power, and duty, to appraise each case on its facts and to enforce judicial sensibilities as to "speediness" and acceptable delay. Speedy trial statutes and rules afford conceptually distinct mechanisms for achieving ends more temporally concrete.¹⁹⁹ Because speedy trial statutes and rules possess a fully legitimate

197. Federal constitutional, state constitutional, federal extraconstitutional (statutory and rule-based) and state extraconstitutional (statutory and/or rule-based).

198. *Barker v. Wingo*, 407 U.S. 514, 522 (1972).

199. This discussion does not develop the potential role state constitutional guarantees might play, in advancing speedy trial goals, for two reasons. First, most state courts have simply declined to accept the invitation to interpret their state constitutions as conferring substantively greater—indeed, even different—rights than do parallel federal constitutional provisions. Second, even if such were done, time-precise extraconstitutional rights would necessarily still provide speedy trial requirements generally stricter than those constitutionally mandated; otherwise, the extraconstitutional rights would be at best superfluous, at worst unconstitutional as applied. In either event such extraconstitutional rights would, presumably, be subject to prompt legislative revision or judicial reinterpretation.

existence independent of constitutional provisions, they need not be deemed "implementations" or "constructions" of the constitutional rights and, as a result, need not be governed by all of the intermediate premises and conclusions—particularly as to excusable causes of delay—governing constitutional adjudication.

Each claim of speedy trial deprivation may give rise to both constitutional and extraconstitutional analyses. The extraconstitutional analysis may properly be based on objective criteria that are distinct from the unwieldy subjective criteria imposed on constitutional analysis, provided constitutional rights are not impinged. Indeed, such extraconstitutional criteria, stricter than constitutional requirements, would tend to obviate the necessity of reaching or resolving constitutional claims.²⁰⁰ Currently, however, the boundary between these analyses is unnecessarily blurred.²⁰¹

If a wholly non-constitutional approach to speedy trial effectuation is consciously posited, statutes and rules may be drafted in a manner which avoids the current practices of either, one, very briefly, and superfluously, recapitulating constitutional protection or, two, very extensively reciting excusable and excludable causes of delay, which generally parallel those of constitutional stature. Moreover, the sanction to be imposed for failure to comply with extraconstitutional provisions may properly be less than and different from absolute discharge of the defendant, the mandatory constitutional sanction.²⁰² In view of the reluctance of many judges to apply so drastic a remedy—and thus to find constitutional deprivation²⁰³—the availability of lesser and different remedies may prove more successful in facilitating compliance with extraconstitutional provisions. Straight-forward enunciation of a strict time limit—perhaps specifying a date for entry of judgment in addition to a trial date²⁰⁴ and clearly defining

200. If stricter extraconstitutional requirements are met, no constitutional issue arises; if breached, depending on the sanction imposed, the constitutional issue may similarly be avoided.

201. Thus many states have adopted the *Barker* test not merely to resolve state constitutional claims, see note 18 *supra*, but also to resolve defendants' extraconstitutional claims. See, e.g., *Chester v. State*, 298 So. 2d 529 (Dist. Ct. App. 1974), *cert. denied*, 310 So. 2d 304 (Fla. 1975); *State v. Donnell*, 239 N.W.2d 575 (Iowa 1976); *State v. Alvarez*, 189 Neb. 281, 202 N.W.2d 604 (1972); *State v. Erickson*, 241 N.W.2d 854 (N.D. 1976). Further, as the data in Part II demonstrate, courts treat the various causes of delay as equally excusable, or inexcusable, for constitutional and extraconstitutional purposes.

202. *Strunk v. United States*, 412 U.S. 434, 440 (1973).

203. See notes 47-49 *supra* and accompanying text.

204. It has been held that protracted interruptions of a criminal trial due to interlocutory appeals precluding rendition of a speedy judgment may violate a defendant's state and federal constitutional and state statutory speedy trial rights. *People v. Hammond*, 84 Mich. App. 60, 269 N.W.2d 488 (1978). Specification of an extraconstitutional time limit for entry of judgment, whether in addition to a specified time limit for trial, could serve to prevent the constitutional

the contours of "trial"²⁰⁵—with far fewer exceptions, less drastic but more encompassing sanctions, and generally nonwaivable application, may prove more efficacious in achieving speedy criminal trials.

To move criminal cases through the justice system expeditiously, speedy trial statutes and rules can properly refuse to excuse delays attributable to a number of constitutionally excusable causes. For example, excluding from time period computation the delay introduced by plea negotiations, whether or not fruitful, encourages neither defendant nor prosecutor to consummate the negotiations promptly or within the prescribed period. Declining to exclude such delay would necessitate that such negotiations conclude within the prescribed period, possibly accelerating, but surely not precluding nor substantively affecting plea negotiations.²⁰⁶ Such a provision would clearly impose time constraints on counsel, particularly defense counsel whose pretrial preparation ordinarily commences after the period has commenced to run. Even assuming that the negotiation process, as such, does consume considerable time that would otherwise be spent on pretrial preparation, this factor can be taken into account when establishing the extraconstitutional time period or periods.

In the same fashion, current indulgence, and exclusion, of much delay emanating from motion practice permits motions to be made in order to prolong pretrial delay.²⁰⁷ Were such delay not excluded but coupled with imposition of subordinate time limits within which motions, and responsive papers, must be filed—perhaps tying them to other pretrial hearings—such delay might be substantially circum-

issue from arising and would clarify that "trial"—for nonconstitutional "speedy trial" purposes—requires merely commencement of trial.

205. Enactments should define "trial" in order to remove the ambiguity whether the term is intended to denote mere commencement or actual conclusion of trial, or entry of judgment. *See* note 204 *supra*. Moreover, drafting should resolve questions whether "trial" is intended to include probation or parole revocation proceedings, *see, e.g.,* *Young v. State*, 305 So. 2d 307 (Dist. Ct. App. 1974), *cert. denied*, 317 So. 2d 762 (Fla. 1975); *Toman v. State*, 213 Kan. 857, 518 P.2d 501 (1974), or sentencing hearings. *Compare In re Shute*, 58 Cal. App. 3d 543, 130 Cal. Rptr. 270 (1976) and Cal. Penal Code § 1381 (West 1970) with *Layne v. State*, ___ Ind. App. ___, 361 N.E.2d 170 (1977) (construing Ind. R. Crim. P. 4).

206. Distinguish, however, the situation in which such negotiations—within the prescribed period—culminate in a deferred prosecution of defendant pursuant to statute. *See* notes 56, 135-36 *supra* and accompanying text. Because deferred prosecution statutes enjoy a separate statutory purpose with distinct aims they necessarily impinge on the goals at which speedy trial statutes and rules aim. As a consequence, the delay thus contingently introduced would survive this suggested modification of speedy trial statutes/rules.

207. Under the Speedy Trial Act of 1974, for instance, judges will frequently take motions "under advisement" for the purpose of excluding time from the prescribed period for trial. *See* Project, *The Speedy Trial Act: An Empirical Study*, 47 Fordham L. Rev. 713, 737 (1979).

vented. While this may, on occasion, force court and counsel to dispose expeditiously of complex issues, in view of the relatively routine nature of most pretrial practice, the ultimate question is whether such time constraints on balance are desirable to promote the ends toward which the speedy trial guarantee is directed. Once more, since certain types of offenses tend to import more complicated and multifaceted issues, this factor can be taken into consideration when the applicable time period is established.

Permitting prescribed time periods for trial to be ignored upon agreement of the parties allows the societal interest in speedily disposing of criminal actions to be vitiated without there inuring, necessarily, any corresponding benefit to the accused. With certain specific exceptions, as for deferral of prosecution pursuant to statute, delay interposed by agreement could be deemed extraconstitutionally inexcusable.

Moreover, perhaps the most litigated statutory and rule provisions are the all-encompassing exclusions of delay caused "by or on behalf of defendant" or for "good cause,"²⁰⁸ standards under which many of the specific fact patterns discussed above²⁰⁹ were litigated. The inherent virtue of such qualitatively limitless exceptions is the freedom they afford the courts to do justice without restriction; their inherent vice, that the courts do so. The exceptions envelope the rule. Elimination of such exclusions would both impress, with force, the compelling importance of proceeding to trial within the prescribed period and would remove a very common source of speedy trial litigation.

In lieu of such exclusions, extraconstitutional provisions can be drafted with a view toward tailoring the prescribed period, in rough measure, to the offense involved. A rudimentary version of this approach is apparent in many statutes and rules which establish longer pretrial periods in felony, than in misdemeanor, cases,²¹⁰ and/or permit extended pretrial delay if complex crimes are alleged.²¹¹ The principle, simply stated if not simply applied, is that offenses which have historically required extended leadtime for investigation and trial preparation be granted it—but within fixed limits. The balance, once more, is between the interests furthered by the speedy trial guarantee and the constraints strict limits may impose in individual cases. The

208. For examples of statutes and rules providing exclusions for good cause, see *Ariz. R. Crim. P.* 8.4(a); *Ind. R. Crim. P.* 4(A)-(C); *Ohio Rev. Code Ann.* § 2945.75(D) (Page 1975). For examples of those with "good cause" exceptions, see *Alaska R. Crim. P.* 45(d)(7); *Ark. R. Crim. P.* 28.3(h); *Mich. Gen. Ct. R.* 789.2(5); *Utah Code Ann.* § 77-51-1(2) (Supp. 1979).

209. See pt. II(B) *supra*.

210. See, e.g., *Cal. Penal Code* § 1382 (West 1970 & Supp. 1979); *Fla. R. Crim. P.* 3.191(a)(1); *La. Code Crim. Proc.* art. 578 (West Supp. 1979).

211. See provisions cited note 153 *supra*.

right to a speedy trial and the right to avoid a precipitous trial are separate but related rights: both are designed to assure an accused a fair trial, to prevent undue delay in one instance and undue haste in the other.²¹² Due process protections ensure that extraconstitutional fixed time limits will not prejudice the accused's defense.

Many of the delays currently excluded under speedy trial statutes and rules are subject to exclusion because failure to do so would frequently result in expiration of the applicable time limit before defendant's trial, and the mandatory sanction, if that occurs, is ordinarily absolute discharge of defendant. This is a result which few, other than defendants, appear anxious to effect. The sanction of mandatory discharge does, with a vengeance, vindicate defendant's interest in a speedy trial if delay is attributable to the prosecution. However, it fails entirely to protect society's interest in administering justice promptly, regardless of defendant's possibly conflicting desires—except to the extent that, as a club, it serves to motivate prompt prosecution.²¹³ Permissive, if not mandatory, imposition of lesser sanctions, which would not dictate recognition of such a volume of excludable delays, may well suffice to achieve timely trials.

Expressly empowering or requiring the courts to order sanctions against either or both the prosecution or defense, including respective counsel, upon simple expiration of the applicable period absent trial might provide an avenue for redress of all interests, circumventing judicial reticence to dismiss with prejudice all pending charges. It is impossible to predict with accuracy which, if any, lesser sanctions would significantly improve speedy trial effectuation. However, such sanctions could include dismissal without prejudice of pending charges, a sanction already imposed in certain jurisdictions.²¹⁴ It can be argued that such dismissal is a toothless formality since defendant can be indicted or charged a second time. The inconvenience and discomfiture attendant upon this sanction, however, should not be overlooked: a prosecutor's office cannot afford to devote unlimited time to redrafting indictments or informations, and no individual prosecutor will relish the prospect.

A second, lesser sanction currently imposed in some jurisdictions is automatic discharge of defendant from pretrial custody upon expiration of the prescribed period.²¹⁵ Appropriately, the impact of this

212. *People v. Lewis*, 17 Ill. App. 3d 188, 308 N.E.2d 59 (1974), *aff'd*, 60 Ill. 2d 152, 330 N.E.2d 857 (1975); *State v. Dowell*, 16 Wash. App. 583, 557 P.2d 857 (1976).

213. Even this threat is mitigated by the expressed reluctance of a number of courts to impose this dismissal sanction. See notes 47-49 *supra* and accompanying text.

214. See Appendix *infra*.

215. *Id.*

sanction will intensify directly with the seriousness of the offense charged and the perceived social threat posed by the accused. Potentially adverse public reaction to release of individuals, or large numbers of defendants, as well as institutional pressures, may be expected to encourage adherence to fixed time limits for trial.

Few sanctions appear as foreboding to the defense, in many cases, as the prospect of trial itself; this alone augurs for sanctions less than absolute discharge. The availability of contempt sanctions, especially if they may be directed at counsel for either party, may prove a strong stimulus against dilatory behavior. These might include, or be coupled with, assessment of fixed counsel fees if a successful motion for sanctions should be brought by the adverse party due to unexcused delay. In short, reliance could properly be placed on judicial discretion to fashion appropriate remedies, perhaps dictating the alternative imposition of a certain sanction such as dismissal without prejudice, upon lapse of the prescribed period. The threat of lesser penalties which are more certain to be imposed may well be a sharper spur to timely trial than the threat of an outcome-determinative penalty which courts candidly confess they are reluctant to impose.

Precluding judicial reliance upon traditional waiver analysis, by rendering extraconstitutional rights nonwaivable through inadvertence, may also further the goals underlying the speedy trial guarantee. Introduction of common law waiver analysis, with its implicit invitation to result manipulation through fact characterization, not only stimulates litigation but also substantively detracts from the effectiveness of statutes and rules. If the extraconstitutionally prescribed trial date could not be waived through inadvertence, the defendant would be better protected against both those anxieties and that prejudice engendered by extended delay which underlie traditional formulations of the speedy trial guarantee. At the same time, the social interest in the prompt administration of justice would be advanced. Courts have at their disposal other methods to obviate unconscionable results in extraordinary circumstances.²¹⁶

Excising traditional waiver theory from extraconstitutional analysis, linked with the imposition of lesser sanctions than absolute discharge and the establishment of firm time limits within which trial must be held, offers the prospect of achieving speedier trials through wholly

216. See *United States v. Beberfeld*, 408 F. Supp. 1119, 1122, 1124-25 (S.D.N.Y. 1976) (holding the Second Circuit rule right nonwaivable but avoiding dismissal of charges against defendant, despite expiration of the prescribed period, by ruling that defendant's ineffective waiver of trial within the period—upon which the government relied—equitably estopped defendant from asserting the speedy trial claim).

non-constitutional means. Notably, constitutional ends can be attained without addressing or undertaking cumbersome constitutional analysis. Perhaps only by deconstitutionalizing the guarantee in this manner, thereby extricating it from the fact-laden morass of contemporary constitutional theory, can the constitutional right be effectuated.

APPENDIX

EXTRACONSTITUTIONAL SPEEDY TRIAL PROVISIONS

State	Non-Demand ²¹⁷ Statutes or Rules	Demand ²¹⁸ Statutes or Rules	Sanction for Violation ²¹⁹		
			Dismissal With or Without Prejudice	Dismissal Without Prejudice (Discretionary)	None Specified
Ala.*					Discharge from Pretrial Incarceration Only
Alaska†	ALASKA R. CRIM. P. 45		R. 45(g)		
Ariz.*†	ARIZ. R. CRIM. P. 8			R. 8.6	
Ark.*†	ARK. R. CRIM. P. 27-30		R. 30.1(a)	R. 30.1(b)	
Cal.*	CAL. PENAL CODE § 1382 (West 1970 & Supp. 1979)	CAL. PENAL CODE § 1381 (West 1970 & Supp. 1979)		§ 1387	
Colo.*†	COLO. REV. STAT. § 18-1-405 (1973) COLO. R. CRIM. P. 48(b) ²²⁰		§ 18-1-405(1) R. 48(b)(1)		
Conn.*					
Del.*					

APPENDIX

EXTRACONSTITUTIONAL SPEEDY TRIAL PROVISIONS				
State	Non-Demand ²¹⁷ Statutes or Rules	Demand ²¹⁸ Statutes or Rules	Sanction for Violation ²¹⁹	
			Dismissal Without Prejudice (Discretionary)	Dismissal With or Without Prejudice (Discretionary) None Specified Discharge from Pretrial Incarceration Only
Fla.*	FLA. R. CRIM. P. 3.191(a)(1)	FLA. R. CRIM. P. 3.191(a)(2)	R. 3191(b)(1)	
Ga.*		GA. CODE. ANN. §§ 27-1901 to 1901.2 (1978)	§§ 27-1901 to 1901.2	
Hawaii*				
Idaho*	IDAHO CODE §§ 19- 106, -3501 to -3506 (1979) IDAHO R. CRIM. P. 48(b)		§§ 19-3501, -3506 R. 48(b)(3)	§§ 19-3501, -3506 R. 48(b)(3)
Ill.*	ILL. ANN. STAT. ch. 38, § 103-5(a) (Smith-Hurd 1970) ²²¹	ILL. ANN. STAT. ch. 38, § 103-5(b) (Smith-Hurd 1970) ²²²	§§ 103-5(d)-(e), 114-1(e)	
Ind.*	IND. R. CRIM. P. 4(A)	IND. R. CRIM. P. 4(B)	R. 4(C)	

Iowa*	IOWA R. CRIM. P. 27	R. 27(1)	R. 27(1)
Kan.*†	KAN. STAT. ANN. §§ 22-3401, 3402 (Supp. 1978)	§ 3402(1)-(2)	
Ky.*	Kv. R. CRIM. P. 9.02		R. 9.02
La.	LA. CODE CRIM. PROC. ANN. arts. 578-583 (West 1967 & Supp. 1980)	art. 581	
Me.*	ME. R. CRIM. P. 48(b)		R. 48(b)**
Md.*	MD. CODE ANN. art. 27, § 591 (1976)		§ 591 ²²³
Mass.*		MASS. R. CRIM. P. 36	R. 36(b)(B)(1)
Mich.*	MICH. COMP. LAWS ANN. § 768.1 (1968) MICH. GEN CT. R. 789	MICH. COMP. LAWS ANN. § 767.38 (1968)	§ 767.38 R. 789.2
Minn.*†	MINN. R. CRIM. P. 11.10	MINN. R. CRIM. P. 11.10	R. 11.10
Miss.			
Mo.*†	MO. ANN. STAT. § 545.780 (Vernon Supp. 1980)		§ 545.780

APPENDIX

EXTRACONSTITUTIONAL SPEEDY TRIAL PROVISIONS					
State	Non Demand ²¹⁷ Statutes or Rules	Demand ²¹⁸ Statutes or Rules	Sanction for Violation ²¹⁹		
			Dismissal With Prejudice	Dismissal Without Prejudice (Discretionary)	Dismissal With or Without Prejudice None Specified Discharge from Pretrial Incarceration Only
Mont *	MONT CODE ANN § 46-13 201 (1979)	§ 46 13 201(3)	§ 46 13 201(3)	§ 46 13 201(3)	
Neb *	NEB REV STAT §§ 29-1205 to 1209 (1975)	§ 29 1208			
Nev *	NEV REV STAT §§ 178 556, 562 (1973)	§ 178 562(1)			
N H *					
N J *	N J R CRIM P 3:25-3			R 3:25-3	
N M *	N M R CRIM P (Dist Ct) 37(b)		R 37(d)		
N Y *	N Y CIV RIGHTS LAW § 12 (McKinney 1976) N Y CRIM PROC LAW § 30 30 ^{22a}			§ 12	§ 30 30 ^{22b}

(McKinney 1971 & Supp. 1979)			
N.C.*	N.C. GEN. STAT. § 15A-701 to -704 (1978 & Supp. 1979)	§ 15A-703	
N.D.*†	N.D. R. CRIM. P. 48(b)	R. 48(b)**	
Ohio*	OHIO REV. CODE ANN. §§ 2945.71-.73 (Page 1975 & Supp. 1979) OHIO R. CRIM. P. 48(b)	§ 2945.73(D) § 2945.73(D)	R. 48(b)**
Okla.*	OKLA. STAT. ANN. tit. 22, § 13(West 1969)		§ 13
Or.*	OR. REV. STAT. §§ 135.747, .750, .753 (1977)	§ 135.753(2) § 135.753(2)	
Pa.*	PA. R. CRIM. P. 1100	R. 1100(f)	
R.I.*	R.I. R. CRIM. P. (Super. Ct.) 48(b)	R.I. GEN. LAWS § 12-13-7 (Supp. 1979)	R. 48(b)** § 12-13-7
S.C.*		S.C. CODE § 17-23-90 (1976)	§ 17-23-90
S.D.*	S.D. COMP. LAWS ANN. § 23A-16-3 (1979) S.D. R. CRIM. P. 18	§ 23A-16-3 ²⁶	R. 18

APPENDIX

EXTRACONSTITUTIONAL SPEEDY TRIAL PROVISIONS

State	Non-Demand ²¹⁷ Statutes or Rules	Demand ²¹⁸ Statutes or Rules	Sanction for Violation ²¹⁹			Discharge from Pretrial Incarceration Only
			Dismissal With Prejudice	Dismissal Without Prejudice	Dismissal Without Prejudice (Discretionary)	None Specified
Tenn.*	TENN. CODE ANN. § 40-2001 (1975) TENN. R. CRIM. P. 48(b)					§ 40-2001 R. 48(b)**
Tex.*	TEX. CODE CRIM. PROC. ANN. art. 1.05 (Vernon 1977)					art. 1.05
Utah*†	UTAH CODE ANN. §§ 77-51-1, -1-8(6) (1978)		§§ 77-51-1(2), -6	§ 77-51-1(2), -6		
Vt.*	Vt. R. CRIM. P. 48(b) Vt. S. Ct. ADMIN. ORDER No. 5				R. 48(b)(1)** ADMIN. ORDER No. 5	
Va.*	VA. CODE § 19.2-243 (1975)		§ 19.2-243			
Wash.*	WASH. R. CRIM. (Super. Ct.) 3.3		R. 3.3(i)			

W. Va.*	W. VA. CODE § 62-3-21 (1977)	§ 62-3-21	
Wis.*	Wis. STAT. ANN. § 971.10(1) (West 1971 & Supp. 1979-1980)	Wis. STAT. ANN. § 971.10(2)(a) (West 1971 & Supp. 1979-1980)	§ 971.10(4)
Wyo.*	Wyo. R. CRIM. P. 45(b)		R. 45(b)**
	Interstate Agreement on Detainers art. IV(c)	Interstate Agreement on Detainers art. III(a)	arts. III(d), IV(c), V(c)
		Uniform Manda- tory Disposition of Detainers Act	§ 3
	Speedy Trial Act of 1974, 18 U.S.C. § 3161 (1976)		§ 3161(a)
	FED. R. CRIM. P. 48(b) FED. R. CRIM. P. 50(b) ²¹		R. 48(b) ²²⁷ R. 50(b) ²²⁹

* Jurisdictions which have enacted the Interstate Agreement on Detainers.

† Jurisdictions which have enacted the Uniform Mandatory Disposition of Detainers Act.

** These rules track Fed. R. Crim. P. 48(b), which provides that the court may dismiss for protracted delay but does not specify whether this delay is to be with or without prejudice. Such rules presumably incorporate the federal intention to permit dismissal without prejudice, *see* cases cited note 227 *infra*, when the basis for the dismissal is not constitutional deprivation but common law failure to prosecute. *See, e.g.*, State v. Paquette, 117 R.I. 505, 368 A.2d 566 (1977).

217. "Non-demand" statutes or rules are those that provide rights which are self-effectuating, triggered automatically by accusation of the defendant (including arrest, indictment, filing of an information or presentment, arraignment, and the like), irrespective of any formal demand by the defendant for a speedy trial.

218. Demand statutes or rules are those which provide rights triggered only by defendant's demand of a speedy trial.

219. Citation of the same or different sections of the same statute in more than one column indicates that either different categories of crime or different classes of defendants are subject to different sanctions.

220. The Colorado rule and statute are verbatim replicas of one another.

221. Applicable to defendants on bail or recognizance.

222. Applicable to defendants in custody.

223. "It provides a declaration of legislative policy, but it de hors sanctions." State v. Hunter, 16 Md. App. 306, 312, 295 A.2d 779, 782 (1972) (footnotes omitted).

224. Section 30.30 requires not that trial occur, but that the prosecution be ready for trial within the prescribed time periods. For the purposes of this article, this statutory effort to promote prompt criminal trials is considered an extraconstitutional speedy trial right.

225. Release from custody is mandated upon expiration of a certain period (graduated by the degree of the offense), followed by dismissal only upon expiration of more extended periods of prosecution nonreadiness for trial.

226. State v. Runge, 89 S.D. 376, 233 N.W.2d 321 (1975).

227. United States v. Novelli, 544 F.2d 800, 803 (5th Cir. 1977); United States v. Crow Dog, 532 F.2d 1182, 1194 (8th Cir. 1976), *cert. denied*, 430 U.S. 929 (1977); United States v. Simmons, 536 F.2d 827, 833-34 (9th Cir.), *cert. denied*, 429 U.S. 854 (1976); United States v. Starr, 434 F. Supp. 214, 216-17 (D.D.C. 1977).

228. Rule 50(b) requires the promulgation of speedy trial plans to facilitate prompt processing of criminal actions in all federal courts. The sanctions indicated on the chart, therefore, refer to violations of particular plans and not violation of rule 50(b) as such.

229. United States v. Wyers, 546 F.2d 599, 602-03 (5th Cir. 1977); United States v. Furley, 514 F.2d 1098, 1104-05 (2d Cir. 1975).